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SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 514

STATES STEAMSHIP COMPANY, a corporation,
Petitioner,

v.

UNITED STATES OF AMERICA, ATLANTIC MUTUAL INSURANCE COMPANY, PACIFIC NATIONAL FIRE INSURANCE COMPANY and THE DOMINION OF CANADA, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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UNITED STATES OF AMERICA, ATLANTIC MUTUAL INSURANCE COMPANY, PACIFIC NATIONAL FIRE INSURANCE COMPANY and THE DOMINION OF CANADA, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on November 15, 1957.

CITATIONS TO OPINIONS BELOW

The unreported memorandum opinion of the District Court for the District of Oregon, dated November 17, 1955, is printed as Appendix A hereto, *infra*, p. 1a.

The unreported findings of fact, conclusions of law and interlocutory decree of the District Court, dated February 10, 1956, are printed as Appendix B hereto, *infra*, p. 3a.

The Court of Appeals rendered three opinions. Its first opinion, delivered on May 31, 1957, is reported at 1957 A.M.C. 1181 and is printed as Appendix C hereto, *infra*, p. 9a. The second opinion was rendered on November 15, 1957, upon petitions for rehearing and substantially reversed the first opinion; it is reported at 1957 A.M.C. 2277 and is printed as Appendix D hereto; *infra*, p. 19a. The third opinion, denying on August 20, 1958, a further petition for rehearing, is reported at 1958 A.M.C. 1775 and is printed as Appendix E hereto, *infra*, p. 35a.

JURISDICTION

The original judgment of the Court of Appeals was entered on May 31, 1957. A second judgment substantially modifying and reversing the first one was entered on November 15, 1957. A petition for rehearing as to the second judgment was denied with opinion on August 20, 1958. This petition for a writ of certiorari is filed less than 90 days after the denial of the rehearing petition.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether, under the Limitation of Liability Act, a corporate shipowner will be conclusively presumed to have privity or knowledge of an unseaworthy condition existing at the time a vessel leaves port.

regardless of the proof as to actual privity or knowledge, where the corporation delegated duties of inspection or repair to competent subordinates or agencies.

2. Whether, under the Limitation of Liability Act, a finding that a shipowner had no knowledge or privity as to the latent deffect of unseaworthiness is necessarily and fatally inconsistent with a finding that the shipowner did not use due diligence required by law to make the vessel seaworthy at the inception of the voyage.

3. Whether a shipowner, under the Limitation of Liability Act, is entitled to rely upon reports of seaworthiness made by qualified governmental and private investigating agencies where a latent and undiscovered defect causes loss.

4. Whether any welded ship which has been declared by competent authorities to be seaworthy following the repair of a crack more than 10 feet long is necessarily notch sensitive and therefore unseaworthy, imposing absolute and unlimited liability on the shipowner under the Limitation of Liability Act.

5. Whether the Court of Appeals misapprehended and grossly misapplied the appellate review standard as to findings of fact in an admiralty case where the court fails to reconcile the findings so as to give effect to all of them and where the court ignores substantial evidence in support of findings which it had previously sustained.

STATUTES INVOLVED

Limitation of Liability Act, 46 U.S.C. § 183:

"(a) The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge or such owner or owners, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending."

(The exceptions provided in (b) are immaterial here.)

Carriage of Goods by Sea Act, 46 U.S.C. § 1303:

"(1) The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to—

"(a) Make the ship seaworthy; . . ."

Carriage of Goods by Sea Act, 46 U.S.C. § 1304:

"(1) Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence . . .

"(2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—

". . . (p) Latent defects not discoverable by due diligence . . ."

Duties of the United States Coast Guard:

46 U.S.C. § 391:

"(b) The head of the department in which the Coast Guard is operating shall require the Coast Guard to inspect before the same shall be put into service, and at least once in every two years thereafter, the hull of each steam vessel, not carrying passengers; to determine to its satisfaction that every such vessel so submitted to inspection is of a structure *suitable for the service in which she is to be employed,* has suitable accommodations for the crew, and is in a condition to warrant the belief that she may be used in navigation, with safety to life, and that the vessel is in full compliance with the applicable requirements of this title or Acts amendatory or supplementary thereto and regulations thereunder; and if deemed expedient, to direct the vessel to be put in motion or to adopt any other suitable means to test her sufficiency and that of her equipment." (Emphasis supplied.)

American Bureau of Shipping Designated to Class all Merchant Vessels, 46 U.S.C. § 881:

"For the classification of vessels owned by the United States, and for such other purposes in connection therewith as are the proper functions of a classification bureau, all departments, boards, bureaus, and commissions of the Government are hereby directed to recognize the American Bureau of Shipping as their agency so long as the American Bureau of Shipping continues to be maintained as an organization which has no capital stock and pays no dividends: Provided, That the Secretary of Commerce and the chairman of the commission shall each appoint one representative who shall represent the Govern-

ment upon the executive committee of the American Bureau of Shipping, and the bureau shall agree that these representatives shall be accepted by them as active members of such committee. Such representatives of the Government shall serve without any compensation, except necessary traveling expenses: Provided further, That the official list of merchant vessels published by the Government shall contain a notation clearly indicating all vessels classed by the American Bureau of Shipping."

STATEMENT

Petitioner's cargo vessel, the S. S. PENNSYLVANIA, was lost in a violent storm in the Gulf of Alaska on January 9, 1952. It was one of the greatest maritime disasters in the history of the Pacific Coast. Of her crew of 46, none survived. The vessel and all of her cargo, including all of the cargo of the respondents, were a total loss. No wreckage was ever found. Only her radiograms told of the distress which preceded her final plunge.

The vessel was a welded steel Victory-type ship built in 1944 by the United States Maritime Commission. Petitioner purchased her from the United States in 1951. During the seven years of her existence she operated in various ocean trades. Five trans-Pacific voyages were made during the one year of petitioner's ownership.

At all times this vessel had passed the inspections and surveys of the American Bureau of Shipping and the United States Coast Guard and was at all times declared by these agencies to be seaworthy. The last inspection had occurred in drydock only two weeks before her final sailing. On Voyage 5, the last voyage

preceding her fatal one, she had suffered a 22-foot crack in the plating of her starboard deck. Turning back to port, she was fully repaired to the satisfaction and approval of the United States Coast Guard, the American Bureau of Shipping, Lloyds of London, the United States Salvage Association and the repair yard, as well as of petitioner's staff. All of these agencies and individuals considered the vessel seaworthy once more. After this repair, she continued Voyage 5 across the Pacific and back without incident.

On January 5, 1952, the S. S. PENNSYLVANIA left Seattle, Washington, on Voyage 6 bound for Yokohama, Japan, over the Great Circle route. On the fourth day out of port, January 9, her radiograms showed the following sequence of events (Ex. 127):

At 5:35 ship's time she reported heavy winds and "mountainous" seas. A short time later she reported a 14-foot crack down the portside, in the engineroom, in a butt weld, starting in the sheer strake, between frames 93 and 94.[1] Noting a "very high westerly sea", she stated that she would turn around as soon as possible and proceed back to Seattle.

Subsequent radiograms revealed that, midst "very high seas", she was taking water in the engineroom,

[1] This description indicated that the new crack started in a butt weld, joining two plates, probably from a latent defect in the weld which created a "notch". The record demonstrates that no one knew of the existence of such a "notch" and that it was not discernible despite all the inspections following the repair of the earlier crack and preceding the final voyage. There was abundant testimony by experts that there was no relationship between the two cracks and that the prior 22-foot crack, which was 90 feet from the later 14-foot crack, did not result in weakening the vessel in other parts. R. 269, 299, 343, 470-471, 477, 847-848, 857, 2742-2743; 2764, 2804, 2884.

and later in No. 1 hold. Steering became difficult following a failure or breakdown of the ship's steering system, a defect which was later reported as remedied. No. 2 hatch was torn open and the deck load went adrift, the seas being too high to permit crewmen to get on deck to secure the load. Then an S.O.S. call went out. Soon thereafter she reported that steering had become impossible "as rudder too far out of water", adding that it "looks like only hope is for weather to moderate." A few minutes later a message was received that the crew was abandoning ship. Nothing more was ever heard.

The petitioner filed a petition in admiralty in the United States District Court for the District of Oregon for exoneration from or limitation of liability. Death claims were filed on behalf of the families of the lost seamen and cargo claims were filed by the owners or underwriters of the lost cargo. The death claims were all settled out of court. Trial then proceeded on the issues between petitioner and the cargo claimants, the respondents herein. The claimed value of this lost cargo was $2,157,335.15.

Petitioner claimed that, by virtue of the Carriage of Goods by Sea Act, 46 U.S.C. §§ 1300-1315,[2] it was not liable for the loss of the cargo and hence was entitled to a decree of exoneration. In that connection it was claimed that (a) the ship had been lost by a peril of the sea, i.e., a violent storm, (b) she was seaworthy, (c) petitioner had used diligence to make her seaworthy, and (d) if any defects did exist they were latent and not discoverable by due diligence.

[2] Petitioner also claimed the benefits of the identical Canadian Act, I Edw. VIII, c. 49, in relation to the lost cargo of the respondent Dominion of Canada.

Petitioner further claimed that if it should be determined that there was liability on its part it was still entitled to a decree of limitation under the Limitation of Liability Act, 46 U.S.C. § 183, since the loss of the cargo was "without the privity or knowledge" of the petitioner.

A protracted trial took place on the issues as thus framed. Many witnesses appeared and numerous documents and records were introduced. During the course of the trial respondents claimed that the 22-foot deck crack which had been repaired was notice to Vallet, petitioner's acting marine superintendent, that the vessel was subject to "crack sensitiveness," which in turn led to the 14-foot crack during the fatal storm. The uncontested testimony in this respect showed that "crack sensitiveness" is merely loose terminology for "notch sensitivity." The latter is a technical term referring to the fact that a crack in a steel plate will invariably develop or start, if at all, at a "notch" (by which is meant any angle like a hatch corner or any discontinuity like a bad weld in the metal of a welded steel ship). The steel is thus said to be "sensitive" to "notches" in that any steel will crack at a notch if enough stress is concentrated at the notch.

In the scientific sense, all welded ships are notch sensitive and the S. S. PENNSYLVANIA was in no way unique in being notch sensitive. Given a notch and sufficient stress at that point, a crack will occur. And the lower the temperature the more brittle the steel becomes. But there is no known non-destructive test to determine the notch sensitivity of steel, to determine when and where it will crack. The only acceptable test is to take the steel to a laboratory and

break it or destroy it in making a laboratory test. And since the test of one steel plate taken from a ship is no test of an adjoining plate, which may have been made at a different time in another mill, there is no way of testing a whole ship short of its substantial destruction.

On November 17, 1955, the District Court rendered a memorandum opinion. Appendix A hereto, *infra*, p. 1a. The court held that the storm was not of such magnitude as to constitute a peril of the sea and that the fact that other vessels withstood the wind and the seas "leads to the inescapable conclusion that the Pennsylvania was not seaworthy, or it too would have survived." But the court also stated that just "what latent defects in hull or equipment were responsible for the disaster cannot be determined with certainty" and that "any defects in the vessel which caused her to sink were not apparent." The court concluded that "those charged with her inspection used the care of reasonable and prudent persons and the unseaworthiness of the vessel was without the privity or knowledge of the owner of the vessel." Accordingly, the court ruled that petitioner was "entitled to limit the liability of the vessel to the pending freight" pursuant to the Limitation of Liability Act.

The court subsequently, after a brief hearing, accepted almost verbatim the findings submitted by the respondent United States.[3] See Appendix B hereto.

[3] The court declined to accept findings and a decree proposed by petitioner to the effect that it was entitled to exoneration under both the Carriage of Goods by Sea Act and the Canadian Act since the defects, if any, were said by the court in its opinion to be "latent", and since the court unqualifiedly held that "those charged with her inspection used the care of reasonable and prudent persons."

infra, p. 3a. The important findings so adopted were briefly as follows:

Finding III: The storm in which the vessel sank was not of such magnitude as to constitute a peril of the sea. The sole and proximate cause of the sinking was the vessel's own unseaworthiness.

Finding IV: The contributory factors responsible for the sinking, as revealed by the radiograms, were: (1) the sustaining of a crack down the portside; (2) the entry of water into the engineroom through this crack; (3) the sustaining of a failure or breakdown of the steering system for a time; (4) the taking of water in No. 1 hold; and (5) the coming adrift of the deck cargo and the filling of No. 2 hatch with water.

Finding V: The aforementioned faults and failures, "together with the crack sensitiveness of the vessel to extreme cold weather by reason of a former 22-foot crack in her deck occurring on her previous Voyage V, which crack was fully repaired," were factors of unseaworthiness culminating from the unseaworthy condition at the inception of the voyage which proximately caused the vessel's sinking during weather that should have been expected and anticipated.

Finding VI: The evidence was insufficient to show that "petitioner used the due diligence required by law to make the vessel seaworthy at the inception of her voyage" so as to entitle it to exoneration from liability.

Finding VII: But "the evidence is sufficient to show that the unseaworthy condition of the vessel at the inception of her voyage was without the privity

or knowledge of petitioner, and the Court finds that the unseaworthy condition of the vessel at the inception of her voyage was not with the privity and knowledge of the petitioner."

An interlocutory decree in accordance with these findings was entered on February 16, 1956. The decree denied exoneration but granted limitation, holding petitioner liable only up to the pending freight value of $82,256.25 plus interest. Petitioner thereafter appealed from that part of the decree denying exoneration, while respondents appealed from the limitation imposed by the decree.

On May 31, 1957, the Court of Appeals for the Ninth Circuit, finding ample evidence to support the foregoing findings,[4] unanimously affirmed the District Court's decree in all respects. Appendix C hereto, *infra*, p. 9a. With reference to the portion of the decree limiting liability and Finding VII (finding the unseaworthiness was not with petitioner's privity and knowledge), the Court of Appeals found substantial supporting evidence that:

1. Vallet, petitioner's acting marine superintendent, had no knowledge of any defect in the steering mechanism prior to the start of the last voyage;

2. Coast Guard inspectors, who checked the steering gear, found it in good condition prior to that last voyage; and

[4] The Court of Appeals expressly relied upon this Court's ruling in *McAllister* v. *United States*, 348 U.S. 19, 20 (1954), that "findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." Appendix C hereto, *infra*, p. 11a.

3. The previous crack in the deck plates had been completely repaired and fragments of the steel had been sent to the National Bureau of Standards, which found the tensile strength better than the requirements in effect when the ship was built. Hence Vallet could be charged with no knowledge of the vessel's "crack sensitivity."

All parties filed petitions for rehearing. On November 15, 1957, the Court of Appeals denied petitioner's request for rehearing as to the denial of exoneration. At the same time and without allowing opportunity for further argument, the court granted respondents' request that the affirmance of the limitation portion of the decree be reconsidered. It thereupon withdrew the portion of its initial opinion which approved the limitation of liability and substituted therefor an opinion which concluded that it was error to limit liability. Appendix D hereto, *infra*, p. 19a.

This new judgment of the Court of Appeals was bottomed on the premise that Finding VII was "completely inconsistent" with Finding VI and hence was fatally defective as a basis for granting limitation. Finding VI had been to the effect that petitioner had not used the due diligence required by law to make the vessel seaworthy at the inception of the last voyage and to entitle it to exoneration. The Court of Appeals reasoned that the only persons whose lack of due diligence could have been involved in Finding VI were petitioner's managing officers, including Vallet. Since one of the factors of unseaworthiness had been found to be the vessel's crack sensitivity (Finding V), Vallet did not use due

diligence in correcting that factor before the last voyage began (Finding VI). Hence, the court said, it was erroneous for Finding VII to conclude that the unseaworthy factor of crack sensitivity at the inception of the voyage was without the privity and knowledge of petitioner, acting through Vallet. The Court of Appeals recited at length certain evidence which was said to show that Vallet knew or should have known of the vessel's crack sensitivity.

Petitioner sought a rehearing of this new judgment of reversal as to limitation. On August 20, 1958, the Court of Appeals denied rehearing with an opinion that purported to clarify its second opinion dated November 15, 1957. Appendix E hereto, *infra*, p. 35a. In this third opinion the Court of Appeals again denied limitation on the ground that Finding VII was erroneous and that the 22-foot deck crack was notice to Vallet that the vessel had a crack sensitivity, was thereby unseaworthy and should not have been allowed to sail.

REASONS FOR GRANTING THE WRIT

1. The Judgment of the Court of Appeals on Rehearing is Directly in Conflict With the Applicable Decisions of This Court as to the Proper Scope of Appellate Review of Trial Court Findings and as to the Impact of the Limitation of Liability Act.

The Court of Appeals, in rendering its judgment on rehearing on November 15, 1957, has ruled in a manner not only inconsistent with its own prior judgment of May 31, 1957, but also with the applicable rulings of this Court. These conflicts involve several important aspects of admiralty law and in no way call upon this Court to review or resolve disputed issues of fact.

a. Appellate review standards

In *McAllister* v. *United States*, 348 U.S. 19, 20 (1954), this Court ruled that a trial court finding in an admiralty case should not be set aside unless it is "clearly erroneous", and that a finding is not "clearly erroneous" unless "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

In its original opinion of May 31, 1957, the Court of Appeals paid explicit heed to this standard of appellate review. After a careful reading of the District Court's findings and an examination of the entire record, the Court concluded that none of the findings was "clearly erroneous" and that those findings fully sustained the District Court's conclusions as to exoneration and limitation of liability. But in its subsequent judgment of November 15, 1957, as supplemented by the opinion of August 20, 1958, the Court of Appeals misapprehended and grossly misapplied the *McAllister* review standard. Such misapprehension and misapplication constitute so great a departure from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

A simple yet fundamental facet of the appellate review standard is that the appellate court must treat the trial court findings, to the extent possible, in a manner consistent with the conclusions reached. *Larkin* v. *Upton*, 144 U.S. 19, 21 (1892). The findings must be read together and seemingly inconsistent ones must be harmonized and reconciled so as to prevent conflict on material points, if possible.

Here the District Court held that the petitioner was not entitled to exoneration, but was entitled to limitation of liability. In its original opinion, the Court of Appeals properly read the underlying findings in a consistent manner and in light of the District Court's opinion that just "what latent defects in hull or equipment were responsible for the disaster cannot be determined with certainty."[5] So viewed, Finding VI was read to mean that, with respect to the various possible factors of unseaworthiness mentioned in Findings IV and V, petitioner lacked due diligence in failing to correct one or more of them. Such negligence may have related to something other than failure to correct the vessel's crack-sensitivity. It may have involved merely the neglect of a non-managerial employee to lash the deck cargo properly or to check the steering mechanism. Any such neglect by a non-managerial employee would have been ascribed to petitioner and hence would have been enough to warrant denial of exoneration.[6]

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[5] To the extent that the findings were unclear as to the factors of unseaworthiness as to which the lack of due diligence related, it was proper to refer to the accompanying opinion of the District Court "in order to clarify the meaning of a finding otherwise in doubt." *American Propeller & Mfg. Co.* v. *United States*, 300 U.S. 475, 480 (1937). Moreover, it was enough if the findings stated only the ultimate facts rather than a recital of the evidence tending to prove the ultimate facts. *Raimond* v. *Terrebonne Parish*, 132 U.S. 192 (1889).

[6] "The lack of due diligence which will deprive the owner of exoneration under the Carriage of Goods by Sea Act "refers not merely to a failure of personal diligence on the part of the owners, but also to a failure of diligence by those employed by them to make the ship seaworthy." *Ore Steamship Corp.* v. *D/S A/S Hassel*, 137 F. 2d 326, 330 (C.A. 2, 1943).

At the same time, Finding VII was interpreted to mean that none of petitioner's managerial personnel —particularly Vallet—had any knowledge or privity as to any of the unseaworthy conditions. Since Finding VI, in light of the uncertainty of the circumstances, did not necessarily mean that Vallet negligently failed to correct the crack-sensitive condition, it was consistent to find that he had no knowledge or privity as to that condition.

But on rehearing, the Court of Appeals reversed its own reading of these findings and created an inconsistency where none need have existed. The court insisted that Finding VI must be interpreted to cover negligence as to the crack-sensitivity factor, that only Vallet could have been neglectful in that respect, and that it was therefore inconsistent for Finding VII to fail to impute to him knowledge of this defect.

Having satisfied itself that the trial court meant more in Finding VI than was said as to negligence in failing to correct the crack-sensitivity,[7] the Court of Appeals proceeded to re-examine the evidence relative to Finding VII. This time the Court of Appeals disregarded completely the supporting evidence it had taken pains to point out in the first opinion:[8]

> "As to his [Vallet's] knowledge of the 'crack sensitivity' of the vessel, the previous crack in

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[7] Finding VI actually said nothing about lack of due diligence in discovering the vessel's crack sensitivity. The finding could have been interpreted as relating to lack of due diligence only as to other factors of unseaworthiness.

[8] Appendix C hereto, *infra*, p. 18a.

her deck plates had been completely repaired. Fragments of her steel were sent to the National Bureau of Standards, and a metallurgist of the Bureau testified that its tensile properties were better than the requirements in effect when the ship was built. The crack on the port side and the taking of water in the No. 1 hold are not imputable to the knowledge or privity of Vallet."

Instead, the issue was viewed *de novo* and the entire emphasis was laid on other evidence which was said to warrant the conclusion that Vallet knew or should have known of the crack-sensitivity[9] of the vessel. Such evidence was at best controverted and disputed. By such process, a finding that was not clearly erroneous on May 31, 1957, was made clearly erroneous on November 15, 1957, the date of the second appellate opinion.

Such a *de novo* reviewing of the evidence was plainly improper under the review standard referred

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[9] Thus the Court of Appeals laid great stress on the fact that Vallet had read the 1946 Report of the Board of Investigation, convened by the Secretary of the Navy, on "The Design and Methods of Construction of Welded Steel Merchant Vessels." Ex. 185. The court referred to a passage in that report that the indication was that after a ship has had a previous casualty involving cracks and steel failures "it is somewhat more liable to a casualty than before the first." But the court overlooked the fact that this statement was made only by a subcommittee and that it was rejected by the Board of Investigation, which rendered the more significant conclusion that "A tendency for certain ships to incur repeated casualties can be measured but the trend is not great and the effect is *not significant*." Ex. 185, p. 10; emphasis supplied. Moreover, the subcommittee's repudiated statement was premised solely on a table which compared the number of ships which had actually suffered repeated fractures while in service with the number that theoretically might be expected, solely according to the abstract, mathematical laws of chance.

to in *McAllister* v. *United States*, *supra*. Finding VII, relating as it did to privity and knowledge, was primarily one of fact. *LaBourgogne*, 210 U.S. 95, 117 (1908); *Corgell* v. *Phipps*, 317 U.S. 406, 411 (1943). If there was adequate evidence to support Finding VII—as the Court of Appeals conceded in its first opinion—it became irrelevant that there might be other evidence to support an opposite finding or that the Court of Appeals, were it sitting as a fact-finding body, might have formulated a different finding. Petitioner was entitled to have the evidence viewed in the light most favorable to the trial court's finding, which was presumptively correct. So viewed, Finding VII was not "clearly erroneous". Under the circumstances, the action of the Court of Appeals in this case constitutes a gross abuse of its reviewing powers which demands correction by this Court.[10]

b. The absolute imputation of knowledge

The Court of Appeals thus improperly read Finding VI to cover lack of due diligence as to the unseaworthy factor of crack sensitiveness. It then proceeded to hold that this lack of due diligence was that of Vallet, petitioner's acting marine superintendent, and that petitioner was thereby charged with privity and knowledge as to the crack sensitiveness. In so holding, the court below rendered a judgment directly

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[10] Even if the Court of Appeals were correct in its conclusion that Findings VI and VII were inconsistent, the court should have remanded the matter to the District Court to clarify the findings and eliminate the inconsistency. See *American Propeller & Mfg. Co.* v. *United States*, 300 U.S. 475, 479-480 (1937). It was improper for the Court of Appeals to eliminate the inconsistency by a *de novo* review of the evidence.

in conflict with the applicable decisions of this Court under the Limitation of Liability Act.

One basis for reaching this conclusion as to petitioner's knowledge was the court's adoption of a concept that any lack of due diligence with respect to the structural seaworthiness of the vessel prior to commencing its voyage is necessarily and absolutely imputed to management.[11] In other words, the court held as a matter of law that the duty to exercise due diligence to make the ship structurally seaworthy is nondelegable not only under the Carriage of Goods by Sea Act but also under the Limitation of Liability Act.

As has been said by the textbook authors relied upon by the Court of Appeals,[12] such a ruling is merely "a way of saying that the corporation will be conclusively presumed to have 'privity or knowledge' of the breach or, more directly, that the corporation will not be entitled to limit its liability in such a case no matter what the state of proof on actual privity or knowledge." These authors say that corporate owners cannot escape unlimited liability by delegating duties of inspection or repair to a master, to independent agencies or to subordinate shore officials. Thus Vallet himself was held to have the absolute duty to discover and repair the unseaworthy factor of crack sensitiveness and he could in no way delegate that duty or rely upon the inspections and repairs of competent men in performing that duty. In short, he had no right to rely upon the inspections and reports of his subordinate officers or of the Coast Guard and the American

[11] The court adopted this concept in its last opinion, rendered on August 20, 1958. See Appendix E hereto, *infra*, pp. 38a-40a.

[12] Gilmore and Black, The Law of Admiralty, pp. 701-702 (1957).

Bureau of Shipping. And if he did so rely, knowledge of any defects that did in fact exist was absolutely imputed to him.

Such an automatic equation of lack of due diligence with privity or knowledge in any case where the vessel later proves to have been unseaworthy at the commencement of her voyage is in flat conflict with this Court's decision in *Coryell* v. *Phipps*, 317 U.S. 406, 412 (1943). There this Court held that "one who selects competent men to store and inspect a vessel and who is not on notice as to the existence of any defect in it cannot be denied the benefit of the limitation as respects a loss incurred during the period of storage, unless 'privity' or 'knowledge' are to become empty words."[13]

The ruling below also conflicts directly with this Court's decision in *Earle & Stoddardt* v. *Ellerman's Wilson Line*, 287 U.S. 420, 427 (1932), that an owner's lack of due diligence, which in other connections would constitute breach of a non-delegable duty, is not the equivalent of the owner's personal neglect. It is also in conflict with the long established decisions in other circuits holding that the duty to make the ship sea-

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[13] The principle thus enunciated by this Court has been well stated in *The Erie Lighter 108*, 250 Fed. 490, 494 (D. N.J. 1918): "It is also entirely well settled that an owner, and, in the case of a corporation, the managing officer or officers (in this case the superintendent of the marine department), may employ others to perform the duties ordinarily imposed by law upon the owner, such as equipment, examination, repairs, etc., and, if due diligence is exercised in selecting persons competent for such work, losses or damages done or occasioned through their fault, without actual complicity or knowledge on the part of the owner are done or occasioned without the 'privity or knowledge' of the owner within the meaning of the Limited Liability Acts."

worthy, although non-delegable under the Harter Act or the Carriage of Goods by Sea Act, is delegable under the Limitation Act. *The City of Camden,* 292 Fed. 93, 97 (C.A. 3, 1923); *Pocomoke Guano Co.* v. *Eastern Transp. Co.,* 285 Fed. 7 (C.A. 4, 1922); *The Tommy,* 151 Fed. 570 (C.A. 2, 1907); *Quinlan* v. *Pew,* 56 Fed. 111 (C.A. 1, 1893). See also *A/S J. Ludwig Mowinckels Rederi* v. *Accinanto, Ltd.,* 199 F. 2d 134, 143 (C.A. 4, 1952).

c. The equation of negligence and knowledge

Even if Finding VI and the record could be fairly said to mean that petitioner, acting through Vallet, lacked due diligence in failing to correct the unseaworthy factor of crack-sensitivity, it does not follow that Finding VII was inconsistent or that liability should be unlimited. And the ruling of the Court of Appeals that limited liability was improper under these circumstances directly conflicts with principles long established by this Court pertaining to the Limitation of Liability Act.

Indeed, so sharp is the conflict with the decisions of this Court that the result below can only be described as a calculated refusal to administer the Act "in the spirit of fairness, with a view of giving the shipowners the full benefit of the immunities intended to be secured by it." *Providence Co.* v. *Hill Co.,* 109 U.S. 578, 580 (1883). See also *Coryell* v. *Phipps,* 317 U.S. 406 (1943).

The error of the opinion below and the conflict with this Court's decisions lie in the automatic equation of two separate and distinct statutory concepts: (1) lack of due diligence, or negligence, and (2) privity and knowledge. The court below held that

since Vallet lacked "due diligence" in not correcting the crack sensitiveness, that unseaworthy condition must have existed with the "privity or knowledge" of Vallet and hence of petitioner. Limitation of liability was thereby felt to be improper. Such an equation of concepts and denial of limitation took place in a situation where the crack sensitivity was by definition of a most latent character.

As long ago as 1883 in *Providence Co.* v. *Hill Co.*, 109 U.S. 578, 602-603, this Court made it plain that there is no necessary or automatic equation between the aforementioned concepts. In that case, a shipowner had been found guilty of neglect because of fire on board ship, but he was allowed to limit his liability because he proved that the cause of the fire was without his privity or knowledge. Exoneration and limited liability were held to be two separate defenses, exoneration being a complete rather than a partial defense and requiring a different degree of proof. This Court held that "there is no inconsistency or repugnancy" between the two defenses, and that in a particular case exoneration might be denied while liability was being limited.

A more elaborate statement of the applicable principle is to be found in this Court's opinion in *LaBourgogne*, 210 U.S. 95, 122 (1908), where it was said:

> ". . . although a loss might have happened by the negligence of the owner of the vessel, such loss might yet not have been occasioned with the knowledge or privity of such owner.
>
> "Without seeking presently to define the exact scope of the words 'privity and knowledge', it is apparent from what has been said that it has been

> long since settled by this court that mere negligence, pure and simple, in and of itself does not necessarily establish the existence on the part of the owner of a vessel of privity or knowledge within the meaning of the statute."

This rule has been quoted and followed by innumerable lower federal courts.[14]

It has been suggested, however, that the rulings in the *Providence* and *LaBourgogne* cases represent the older case law, while the more recent cases treat negligence as a synonym for privity or knowledge "so that if the right to exonerate is lost the right to limitation automatically vanishes."[15] Apart from the fact that the more recent cases are lower court decisions that do not support such an equation, this Court has never repudiated or limited the language or holding of the *Providence* and *LaBourgogne* decisions. And if the concepts of negligence and knowledge are to be equated for purposes of the Limitation of Liability Act it should be done only after thorough review and consideration by this Court.

It is true, of course, that it has been held that the knowledge or privity which precludes limita-

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[14] See, e.g., *The Galileo*, 54 F. 2d 913, 915 (C.A. 2, 1913); *Patton-Tully Transp. Co.* v. *Turner*, 269 Fed. 334, 340 (C.A. 6, 1920); *Southern Pacific Co.* v. *United States*, 72 F. 2d 212 (C.A. 2, 1934); *Kitsap County Transp. Co.* v. *Harvey*, 15 F. 2d 166 (C.A. 9, 1926); *The Virginia*, 264 Fed. 986 (D.C. Md., 1919), aff'd. sub nom. *Hines* v. *Butler*, 278 Fed. 877 (C.A. 4, 1921); *Hockley* v. *Eastern Transp. Co.*, 10 F. Supp. 908, 916-917 (D.C. Md. 1935).

[15] Gilmore and Black, The Law of Admiralty, § 10-21, p. 697 (1957). The more recent cases referred to are *The Doris Kellogg*, 18 F. Supp. 159, 169 (S.D.N.Y., 1937); *Great Atlantic & Pac. Tea Co.* v. *Lloyd Brasileiro*, 159 F. 2d 661, 664 (C.A. 2, 1947); *The Edmund Fanning*, 105 F. Supp. 353, 371 (S.D.N.Y., 1952).

tion of liability "means not only personal cognizance but also the means of knowledge . . . of contemplated loss or condition likely to produce or contribute to loss, unless appropriate means are adopted to prevent it." See *The Clevveco*, 154 F. 2d 605, 613 (C.A. 6, 1946). But the fact remains that lack of due diligence or negligence is a concept apart from knowledge or the means of knowledge, and proof or lack of proof as to one concept does not necessarily apply to the other concept.

Thus it is that the record in this case may, and does, demonstrate that, if Vallet was in some way negligent in not correcting the crack-sensitivity of the S.S. PENNSYLVANIA, it was a defect so latent that it would be unfair to impute any knowledge or means of knowledge to him. The failure of the court below to review the findings and conclusions as to liability in light of the distinction between due diligence and knowledge is not only contrary to this Court's decisions in *Providence Co.* v. *Hill Co.*, *supra*, and *LaBourgogne*, *supra*, but also is indicative of the danger which this Court expressed through Mr. Justice Holmes in *Capitol Trans. Co.* v. *Cambria Steel Co.*, 249 U.S. 334, 336 (1919), "the danger that the act should be cut down from its intended effect by too easy a finding of privity or knowledge."

2. The Ruling Below That Petitioner Was Not Entitled to Rely Upon Official Surveys, Inspections and Reports Following the Repair of the Previous Crack is in Direct Conflict With the Ruling of the Court of Appeals for the Second Circuit in Peter Paul, Inc. v. Rederi A/B Pulp, 258 F. 2d 901.

After the repair of the 22-foot crack on the deck of the S.S. PENNSYLVANIA, incurred during Voyage 5, the vessel was surveyed and inspected in port by repre-

sentatives of the American Bureau of Shipping (R. 896-7), the United States Coast Guard (R. 869, 875, 876), the United States Salvage Association (R. 1130-1131), Lloyds of London (R. 1123), the shipyard that did the repairing (R. 849), and by petitioner's port engineer and its chief engineer for the vessel. After the ship went on to complete Voyage 5, the vessel was placed in drydock for its annual drydock inspection. There it was inspected again by representatives of the United States Coast Guard, the American Bureau of Shipping and the petitioner itself. These latter inspections were "from deck down to tank tops" (R. 692) and covered "the whole hull from stem to stern" (R. 733). All of these inspections resulted in favorable reports as to seaworthiness and the earlier reports following the repair of the 22-foot deck crack were directed specifically to that problem.

The Court of Appeals charged petitioner, through its acting marine superintendent Vallet, with privity and knowledge of the crack sensitiveness of the vessel under low temperatures despite the failure of any of these inspections to uncover or report such sensitiveness. The court said the very fact of the prior crack on the deck was significant with respect to the crack sensitiveness in other portions of the vessel. Aside from the grounding of that statement upon a misinterpretation of a written report (see footnote 9, *supra*), the fact remains that the qualified representatives of these various Government and semi-official agencies did not so view the after-effects of the known crack on the deck and they discovered and reported no crack sensitiveness prior to the inception of the last voyage. Indeed, as the Court of Appeals acknowledged in its first opinion, the National Bureau of

Standards actually tested steel fragments from the vessel following the crack repair and found the tensile properties better than the requirements in effect when the ship was built. Appendix C hereto, *infra*, p. 18a.

Under these circumstances, petitioner was entitled to rely upon such inspections and reports—at least to the extent of being freed of any imputation of knowledge or privity as to the existence of crack sensitiveness. The failure of the Court of Appeals to recognize that petitioner's lack of knowledge of the crack sensitiveness could be ascribed to these reports and inspections is directly contrary to the recent ruling of the Court of Appeals for the Second Circuit in *Peter Paul, Inc.* v. *Rederi A/B Pulp*, 258 F. 2d 901 (August 27, 1958).

In the *Peter Paul* case, the steel cargo vessel CHRISTER SALEN suddenly and without warning split in two on the high seas. A few months previously the vessel had suffered a crack at the top of its portside bulwark. This crack was repaired and the vessel was then dry-docked for its regular inspection. Inspection was made by representatives of Lloyds of London, who inspected the hull and found it to be in good condition. A month later the ship cracked in two due to a latent sensitivity in a notch.

The Court of Appeals for the Second Circuit held that the shipowner was entitled to rely upon the Lloyds inspection and report "unless there is some evidence of bias, incompetence or fraud." That court held further that " all the shipowner need establish is that normal precautions were taken to see that a discoverable notch did not exist." There, as in the instant case, the sensitivity was a latent defect not discovered by those charged with thorough inspection.

The conflict between the two cases is the more striking in that the issue in the *Peter Paul* case was whether due diligence had been used under the Carriage of Goods by Sea Act, where the duties are non-delegable and the obligations of the shipowner more severe. In the instant case, on the other hand, the issue was merely privity or knowledge under the Limitation of Liability Act, where the duties are delegable and the obligations much less. But notwithstanding the onerous conditions to be fulfilled by the shipowner in the *Peter Paul* case, the court there held that the shipowner could rely on the judgment of the recognized expert agency. In the circumstances of the instant case, where the onerous conditions are less, the Court of Appeals held that the shipowner could not rely on such judgments.

The right to rely on competent inspections is a fundamental problem in admiralty law and of the utmost importance to shipowners in the conduct of their business. This conflict between circuits should be resolved.[16]

It has long been established, moreover, that a shipowner can select competent inspecting agencies and rely on their surveys, reports and findings as to seaworthiness. Even if such agencies fail to use due diligence in finding factors of unseaworthiness, the shipowner, not being in privity, has been held entitled to limitation. *Earle & Stoddardt* v. *Ellerman's Wilson Line*, 287 U.S. 420 (1932); *Coryell* v. *Phipps*, 317 U.S.

[16] The Court of Appeals for the Second Circuit in the *Peter Paul* case referred to the second opinion of the court below by merely voicing the holding that the prior 22-foot crack in the deck of the S.S. PENNSYLVANIA "should have put the owner on notice that he had an unseaworthy vessel." It did not rely upon the opinion below or otherwise indicate that it approved or agreed with that opinion in any way. 258 F. 2d at 905.

406 (1943); *A/S J. Ludwig Mowinckels Rederi* v. *Accinanto, Ltd.*, 199 F. 2d 134 (C.A. 4, 1952); *The Annie Faxon*, 75 Fed. 312 (C.A. 9, 1896); *The Columbia*, 25 F. 2d 516 (E.D.N.Y., 1927); *The South Coast*, 71 F. 2d 891 (C.A. 9, 1934); *General Foods Corporation* v. *The Troubador*, 98 F. Supp. 207 (S.D.N.Y., 1951); *The Erie Lighter 108*, 250 Fed. 490 (D.N.J., 1918). But the effect of the present decision is that the petitioner is not entitled to rely on such reports and is fully liable if the ship proves to be crack sensitive. This is an obvious departure from the law of limitation that calls for the invocation of the reviewing jurisdiction of this Court.

3. The Issues Raised by the Rulings of the Court of Appeals Are Important in the Administration of the Limitation of Liability Act and to the Entire Maritime Industry.

It has always been the policy of Congress, as expressed repeatedly in the decisions of this Court, to have the Limitation of Liability Act administered in accord with its intent to encourage shipping and not with a "tight and grudging hand." That purpose is not achieved by the rulings below that privity or knowledge is the necessary equivalent of lack of due diligence and that a shipowner's reliance on acknowledged expert investigators will not prevent the imputation of knowledge of a latent defect. If those rulings are allowed to stand, then the statute has indeed been amended in significant ways beyond the legislative intent. It thus becomes appropriate for this Court to grant certiorari to review and correct these important rulings.

The importance of the issues thus raised to the maritime industry is self-evident. Since World War II

there have been at least 4,700 cases of hull cracking reported aboard welded steel vessels constructed by wartime shipyards.[17] Most of these fractures have been minor. Under the ruling below, the owners of such vessels are charged with knowledge and privity that the ships are likely to fracture at certain temperatures in some other portion of the ship unrelated to the original fracture. Absolute and unlimited liability is thus imposed upon the shipowners in all cases of loss resulting from a second and completely unexpected fracture.

They are held to higher standards of knowledge than imposed upon such competent agencies as the Coast Guard and the American Bureau of Shipping. Indeed, the level of care thrust upon shipowners is beyond that scientifically possible as to such latent defects as crack sensitivity.

Such a result flies in the face of all expert testimony[18] and openly flouts all governmental and private agencies who, after thorough investigation, declare these vessels to be seaworthy. No matter how latent or undiscov-

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[17] New York Journal of Commerce, Dec. 19, 1957, p. 11.

[18] David P. Brown, Senior Vice President and Technical Manager of the American Bureau of Shipping and a former member of the working group of the Board of Investigation whose report the Court of Appeals relied upon (see footnote 9, *supra*), testified in this case as follows (R. 2743):

> "Q. Does the fact that a ship has cracked—take a major crack like this crack in the deck of the Pennsylvania—does that indicate any tendency or propensity of that ship toward cracking? . . .
>
> "A. Insofar as the vessel is concerned, we have never been able to establish any significance."

There was no testimony to the contrary.

erable the crack sensitivity may be in the ordinary and reasonable course of investigation by these agencies, the shipowner by the ruling below is held to know more than such agencies and "to possess the combined knowledge and skill of a naval architect and metallurgist." Cf. *Peter Paul, Inc.* v. *Rederi A/B Pulp*, 258 F. 2d 901, 906 (C.A. 2, Aug. 27, 1958).

It is small wonder then, that the decision below has created consternation in the maritime industry. As described by one leading journal,[19] the decision reveals "a great ignorance of matters maritime" and "puts many shipowners in a practically indefensible position in litigaton arising from maritime losses." Another journal[20] has referred to the ruling that petitioner should have known of the crack sensitivity of the S.S. PENNSYLVANIA despite the declarations of seaworthiness by the Coast Guard and the American Bureau of Shipping as having "a most serious effect on shipping everywhere." A seaworthy certificate, it was said, "is the only proof that any shipowner can present to certify his intent to provide a seaworthy ship, and the present ruling, if finally upheld, casts a doubt on this," making it "difficult to speculate on what could take its place."[21]

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[19] Editorial, "Liability of Shipowners Expanded by Judicial Ruling," *Marine Engineering*, February, 1958, p. 13. The effect of the decision was said to be the same "as outlawing pneumatic tires on automobiles because a blow-out caused the death of some occupants" and as charging the driver with negligence "for not having solid rubber wheels on his car."

[20] Editorial, "Vessel Liability," *The Mariner*, January, 1958, p. 32.

[21] Ibid, pp. 32-33.

The General Counsel of the United States Maritime Commission has publicly declared that the decision below is a startling example of a predicted tendency in the second half of the Twentieth Century to construe the Limitation of Liability Act "narrowly and not expansively" and that the court here "refused to permit limitation in circumstances where, in the opinion of many, the owner would have been allowed to limit in times past."[22] "It seems quite possible," said the General Counsel, "that the Court of Appeals might have been motivated, at least in part, by a feeling that the result of our Limitation Act is unduly harsh . . . but in any event the present opinion is a manifestation of the judicial erosion that can be expected unless a limitation formula is adopted that meets the sense of justice, and if Congress doesn't wholly eliminate the doctrine."[23]

The public interest in and the manifest error of the rulings below thus combine to warrant the grant of certiorari in this case.

[22] Mr. E. Robert Seaver, General Counsel for the United States Maritime Commission, made this statement in a paper, "Comments Regarding the 1957 Brussels Convention on Limitation of Shipowners' Liability," submitted to the Maritime Law Association of the United States, Document No. 418, pp. 4269-70 (July, 1958).

[23] Ibid, p. 4270.

CONCLUSION

For the foregoing reasons, petitioner prays that a writ of certiorari issue to review the judgment rendered by the Court of Appeals for the Ninth Circuit in this case.

Respectfully submitted,

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November 13, 1958.

APPENDIX A

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

In Admiralty — No. Civil 6300

In the matter of the Petition of
STATES STEAMSHIP COMPANY,

for Exoneration from or Limitation of Liability,
Petitioner

Memorandum Opinion

This case was brought to trial after ample and exhaustive preparation. The issues are simple and I do not believe a review of the evidence would serve any useful purpose. I shall, therefore, merely state my conclusions without attempting to find support for them by reference to the record.

First to be determined is whether the Pennsylvania storm was of such magnitude as to constitute a peril of the sea. I do not think it could be so considered. It is apparent from the evidence that the weather encountered, if not actually anticipated, certainly was of a kind reasonably to have been expected in January on trans-Pacific voyages over the Great Circle route. There appeared to be nothing catastrophic about the storm. Other vessels withstood the wind and the seas, which leads to the inescapable conclusion that the Pennsylvania was not seaworthy, or it too would have survived.

Just what latent defects in hull or equipment were responsible for the disaster cannot be determined with certainty, although it can be gathered by radiograms sent from the vessel that several contributing factors could have been responsible.

The court having found the vessel to have been unseaworthy the next question is whether under the facts and circumstances petitioner should be denied the right of ex-

emption from liability under the statute, by having imputed to it knowledge that the vessel was not seaworthy, thereby making it privy to the existence of such conditions.

Upon an examination of the record I find that any defects in the vessel which caused her to sink were not apparent. Those charged with her inspection used the care of reasonable and prudent persons and the unseaworthiness of the vessel was without privity or knowledge of the owner of the vessel.

My conclusions are that the Pennsylvania must be held to have been unseaworthy, but her unseaworthiness and her fault are held to have been without the privity or knowledge of her owner, and the petitioner is entitled to limit the liability of the vessel to the pending freight. The motion to dismiss the petition is Denied.

Dated: Phoenix, Arizona, November 17, 1955.

/s/ Dave W. Ling,
Judge

[Endorsed]: Filed November 21, 1955.

APPENDIX B

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

In Admiralty — No. Civil 6300

In the matter of the Petition of
STATES STEAMSHIP COMPANY

for Exoneration from or Limitation of Liability,
Petitioner

Findings of Fact and Conclusions of Law

The above-entitled cause coming on for trial commencing on the 13th day of July, 1954, upon the petition of States Steamship Company, under the provisions of Sections 183 et seq. of Title 46, United States Code, for exoneration from or limitation of liability from all claims arising out of the sinking of the SS Pennsylvania, formerly the Luxembourg Victory, on January 9, 1952, with the total loss of the vessel, all of her crew and personnel aboard and all of her cargo, and it appearing to the court that prior to the time of trial default had been duly entered of all persons having claims arising out of said disaster except those who had filed claims herein, and it further appearing that all claims for death of the crew and personnel aboard on file here had been settled out of court, the trial proceeded upon the sole remaining issues presented by the petition and the claims for loss of cargo, the petitioner being represented by its proctors, Erskine Wood, Esq., Stanley B. Long, Esq., Lofton L. Tatum, Esq., and C. Calvert Knutsen, Esq., the cargo claimants, Atlantic Mutual Insurance Company and Pacific National Fire Insurance Company, being represented by John Gordon Gearin, Esq., and George B. Campbell, Esq., the cargo claimant, United States of America, being represented by Keith R. Ferguson, Esq., Special Assistant to the Attorney General, and Paul D. Hanlon, Esq., formerly Attorney,

Department of Justice, and the claimant, The Dominion of Canada, being represented by Charles Howard, Esq., and evidence both oral and documentary having been introduced, and the petition and all claims in this cause remaining for decision being submitted, the Court now, after due deliberation thereon and consideration of extensive arguments and briefs of counsel, makes the following Findings of Fact and Conclusions of Law:

Findings of Fact

I.

That petitioner, States Steamship Company, in February 1951, purchased from the United States of America the SS Pennsylvania, formerly the Luxembourg Victory, a Victory-type vessel, Official Number 245,327, built for the Government by the Oregon Shipyard and completed on April 5, 1944, with dimensions of 455 feet, 3-11/32 inches in length, with beam of 62.1 feet, and gross tonnage of 7,608 tons.

II.

That on January 5, 1952, the petitioner, as the owner and operator of the S.S. Pennsylvania, sailed said vessel (designated as Voyage VI), from the Port of Seattle for the Port of Yokohama via the Great Circle Route, as a common carrier for hire, having on board the cargo of the claimants which the vessel had received in good order and condition, and that during the course of said voyage the SS Pennsylvania sank during a storm in the Gulf of Alaska at a position of approximately 505 miles WNW of Seattle, Washington, and 535 miles SE of Kodiak, Alaska, with a total loss of the vessel, all of her crew and personnel and the total loss of all her cargo, including all the cargo of the claimants.

III.

The storm, which had been designated as the Pennsylvania storm, in which the vessel sank was not of such mag-

nitude as to constitute a peril of the sea, the weather encountered, if not actually anticipated, certainly was of a kind reasonably to have been expected in January on trans-Pacific voyages over the Great Circle route, and there was nothing catastrophic about the storm as all other vessels in the area withstood the wind and the seas, the sole and proximate cause of the sinking of the Pennsylvania being her own unseaworthiness.

IV.

The contributory factors responsible for the sinking of the S.S. Pennsylvania are found in the radiograms sent from the vessel immediately prior to her sinking, stating that the vessel sustained a crack down the port side between frames 93 and 94; that the crack started in the sheer strake and ran down about 14 feet; that sea water entered the engine room of the vessel through this crack; that the vessel sustained a failure or breakdown of its steering systems and for a time the vessel was completely unable to steer by any method in heavy seas then existing and that if they could not fix the steering gear that they would need immediate assistance; that the vessel was taking water in the No. 1 hold; that the deck cargo on the forward deck came adrift and was taking off the tarpaulins on the forward hatches, and that the No. 2 hatch was open and full of water.

V.

That the foregoing faults, failures, breakdowns and defacts set forth in the preceding finding IV, together with the crack sensitiveness of the vessel to extreme cold weather by reason of a former 22-foot crack in her deck occurring on her previous Voyage V, which crack was fully repaired, were factors of unseaworthiness culminating from the unseaworthy condition of the vessel at the inception of her voyage which prevented her from meeting the expected and to be anticipated weather conditions and

proximately caused her sinking, with the total loss of the vessel, with all of her crew and personnel aboard and all of her cargo.

VI.

That the evidence is insufficient to show that petitioner used the due diligence required by law to make the vessel seaworthy at the inception of her voyage, and the Court finds that the petitioner did not use the due diligence required by law to make the vessel seaworthy and to entitle it to exoneration from liability.

VII.

That the evidence is sufficient to show that the unseaworthy condition of the vessel at the inception of her voyage was without the privity or knowledge of petitioner, and the Court finds that the unseaworthy condition of the vessel at the inception of her voyage was not with the privity and knowledge of the petitioner.

Conclusions of Law

I.

The Court has jurisdiction of the petition and the claims of cargo interests under Rules 51 to 55 of the United States Supreme Court Admiralty Rules.

II.

That the petitioner has failed to prove due diligence to make the S.S. Pennsylvania seaworthy at the inception of the voyage upon which she sank by reason of her unseaworthiness and is not entitled to exoneration from liability to the cargo claimants.

III.

That the petitioner has proved that the unseaworthiness of the SS Pennsylvania at the inception of her voyage was without the knowledge or privity of the petitioner and

is entitled to limit its liability to the value of the freight pending, which amount is set forth in the order of this Court, dated May 26, 1954.

IV.

That the cargo interests are entitled to judgment against the petitioner for the amount of the pending freight in ratio to the amount of their respective claims, with interest at 6% together with their costs.

Let an interlocutory decree enter accordingly and if the parties cannot agree between themselves as to the damages and segregation thereof, the matter shall be referred to a commissioner to be appointed by the Court who shall ascertain the amount thereof and make report to the court in accord with the agreement of the parties made at the commencement of the trial.

Dated this 10 day of February, 1956.

/s/ Dave W. Ling,
Judge

[Endorsed]: Filed February 16, 1956.

INTERLOCUTORY DECREE

This cause coming on for trial commencing on the 13th day of July 1954 and evidence, both oral and documentary, having been introduced, and after oral arguments having been made and briefs filed, was submitted for decision by the Court and the Court having filed its Memorandum Order herein and having entered and made its findings of fact and conclusions of law herein, and being fully advised in the premises, it is hereby

Ordered, Adjudged and Decreed that the petition for exoneration from liability be and the same is hereby denied, and

It Is Further Ordered, Adjudged and Decreed that the petition for limitation of liability to the amount of the pending freight on the S.S. Pennsylvania on January 9, 1955 at the end of her voyage, be and the same is hereby granted, and

It Is Further Ordered, Adjudged and Decreed that the claimant United States of America and claimant Atlantic Mutual Insurance Company, Pacific National Fire Insurance Company, and Dominion of Canada, recover of and from Petitioner States Steamship Company the amount of the said pending freight set forth in the Order of this Court dated May 26, 1954, together with interest and costs, and

It Is Further Ordered, Adjudged and Decreed that if the parties cannot otherwise agree, the matter be referred to Gunther F. Krause as Commissioner to ascertain and compute the amount of the pending freight and the proportions thereof to be paid to each of said claimants pro rata to the amount of their respective claims, and to report the same to this Court with all convenient speed.

Dated this 10 day of February, 1956.

/s/ Dave W. Ling,
Judge

[Endorsed]: Filed February 16, 1956.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

May 31, 1957

No. 15,131

STATES STEAMSHIP COMPANY, a corporation, *Appellant*,

vs.

UNITED STATES OF AMERICA, ATLANTIC MUTUAL INSURANCE COMPANY, PACIFIC NATIONAL FIRE INSURANCE COMPANY and THE DOMINION OF CANADA, *Appellees*.

ATLANTIC MUTUAL INSURANCE COMPANY, *Appellant*,

vs.

STATES STEAMSHIP COMPANY, a corporation, UNITED STATES OF AMERICA and THE DOMINION OF CANADA, *Appellees*.

PACIFIC NATIONAL FIRE INSURANCE COMPANY, *Appellant*,

vs.

STATES STEAMSHIP COMPANY, a corporation, UNITED STATES OF AMERICA and THE DOMINION OF CANADA, *Appellees*.

UNITED STATES OF AMERICA, *Appellant*,

vs.

STATES STEAMSHIP COMPANY, ATLANTIC MUTUAL INSURANCE COMPANY, PACIFIC NATIONAL FIRE INSURANCE COMPANY and THE DOMINION OF CANADA, *Appellees*.

THE DOMINION OF CANADA, *Appellant*,

vs.

STATES STEAMSHIP COMPANY, ATLANTIC MUTUAL INSURANCE COMPANY, PACIFIC NATIONAL FIRE INSURANCE COMPANY and THE UNITED STATES OF AMERICA, *Appellees*.

Appeals from the United States District Court
for the District of Oregon

Before: DENMAN, Chief Judge, and STEPHENS and POPE, Circuit Judges

DENMAN, Chief Judge:

These are appeals from an interlocutory decree of the United States District Court for the District of Oregon on the petition of States Steamship Company, hereafter the Company, for exoneration from or limitation of liability for the total loss of the cargo of the S. S. PENNSYLVANIA, which sank with all hands in the Gulf of Alaska on January 9, 1952, while enroute over the Great Circle route from Seattle, Washington, to Yokohama, Japan.

The district court held (a) that the PENNSYLVANIA was not lost from a peril of the sea; (b) that she was unseaworthy; (c) that the employees of the Company had not exercised due diligence to make her seaworthy, but (d) that the Company was without privity in or knowledge of her unseaworthiness and hence was entitled to limit its liability to the pending freight.

Here there are no claims for loss of life. For loss of cargo, 46 U.S.C. §183 (a) provides that "the liability of the owner of any vessel . . . for any loss . . . incurred without the privity or knowledge of such owner shall not . . . exceed the amount or value of the interest of such owner in such vessel, and her freight pending." The interest of the owner in the vessel is its value after the events leading to the loss of the cargo,[1] here of no value since the vessel was a total loss.

The Company appeals from the denial of its exoneration from liability contending that the evidence conclusively shows that the PENNSYLVANIA was lost because of a peril of the sea (46 U.S.C. §1304 (2) (c)), and that she was not unseaworthy.

The cargo claimants, the United States, the Dominion of Canada, Atlantic Mutual Insurance Co., Pacific National

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[1] City of Norwich, 118 U.S. 468, 492 (1886).

Fire Insurance Co., hereafter Cargo, appeal from the limitation of liability to the pending freight contending the evidence shows that the Company was privy to and had knowledge of her unseaworthiness.

Much of the pertinent testimony supporting the court's decision is viva voce, hence this admiralty appeal is, in effect, governed by Rule 52 (a) F.R.C.P. that:

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

McAllister v. United States, 348 U.S. 19, 20 (1954).

Facts concerning the ship's experience before sinking. The PENNSYLVANIA was a Victory ship, length 455 feet, beam 62 feet, gross tonnage 7,608 tons. On January 5, 1962, the ship left Seattle, and on January 9, 1952, sank in a storm in the Gulf of Alaska about 505 miles WNW of Seattle. Since no wreckage was ever found and there were no survivors, the only information concerning the sinking is in the radiograms received from the ship during the storm. These radiograms show: At 5:35 ship's time (approx.) January 9, 1952, the ship reported WNW wind at force 9 on the Beaufort scale and "mountainous" seas. A little later she reported a 14-foot crack beginning in a butt weld in the sheer strake between frames 93 and 94 running down her side, "very high westerly sea", and stated she would turn around to return to Seattle as soon as possible. At 6:10 she reported she was taking water throught the crack, but that her pumps were holding. At 9:27 she reported that she was steering a course for Seattle (i.e., had succeeded in turning around), "can't steer at present taking water in number one hold and engineroom". At 10:05 a message received from the ship stated that she was taking water in number one hold "down by head cannot steer or get forward to see where the trouble is pumps

holding in engineroom. If we cannot fit steering gear *will* require assistance. Very high seas. Cannot get on deck at present. Deck load adrift taking tarpaulins off forward hatches. Cannot get on deck to rescue." [Emphasis supplied.] The first SOS was sent at 10:20 in a message stating she was taking water in engineroom, number one hold, and was down by the head. At 11:15 she reported tarpaulins in forward hatches were still holding, that she was taking water in number one hold and engineroom, and was using hand steering. At 3:05 P.M., she reported steering gear fixed but unable to steer as rudder too far out of the water, and that number two hatch was open and full of water. At 3:22 the last message stated that the crew was abandoning ship.

The bills of lading provided that the Company was not liable for the loss of the cargo by a peril of the sea. Here the loss of the cargo being admitted the burden of proof is on the Company to prove that such a peril caused its loss.

The accepted definition of a peril of the sea is that of Judge Learned Hand's opinion for the Second Circuit, who stated that it means "nothing more . . . than that the weather encountered must be too much for a well found vessel to withstand." Philippine Sugar C. Agency v. Kobusai Kisan Kabushiki Kaisha, 106 F. 2d 32, 34-35 (2d Circ. 1939).

We think the evidence sustains the district court's finding that the vessel was not lost by a peril of the sea. The messages from the PENNSYLVANIA described the seas as very heavy and that *after a crack in her hull* she was returning to Seattle. After the vessel had been able to turn around in the heavy seas to return to Seattle, she had trouble with her steering gear and then wirelessed: "If we cannot fix steering gear *will require* assistance." [Emphasis added.] From this the court could draw the inference that it was the inherent condition of the ship's hull rather than the heavy seas which caused her sinking.

In the deposition of John W. McMunagle, captain of the Canadian Weather Ship, STONETOWN, he testified as follows:

By Mr. Gearin:

Q. Captain, what would you say would be the usual and expected weather for the vicinity of Weather Station Papa in the winter months?

A. Well, you can expect very rough seas and gales of varying degrees of intensity practically throughout the winter.

Q. Was there anything unusual or unanticipated about the weather conditions that existed in the month of January, 1952, in the vicinity of Weather Station Papa?

A. No.

Q. Do you have an independent recollection of winter weather in the vicinity of Station Papa which is not shown on your log?

A. Yes, we have had weather just as bad in the late fall,—in September and October.

Mr. Wood: Just as bad as what?

The Witness: Pardon?

Mr. Wood: Just as bad as what?

The Witness: As bad as what we have had in the winter months of January and February. We have had gale force in late fall.

McMunagle turned his ship around in the heavy seas, responding to the PENNSYLVANIA'S call for assistance and testified:

Q. At any time when you were searching for the PENNSYLVANIA were you unduly apprehensive for the safety of your vessel? A. No.

Seiichi Mori, the captain of a Japanese ship, testifying through an interpreter.

Q. Captain, was there anything unusual that you recall about the weather and sea conditions that you encountered during this period from January 7th through January 9th?

A. Yes, big storm.

Q. Big storm?

A. Yes, but in winter times, North Pacific Ocean, sometimes we expect the same kind of storm then.

Q. Was there anything unprecedented about the storm that you encountered during this period, for this time of " year?

The Witness: (Through Interpreter) Not unusual.

Mr. Howard: Q. Not unusual?

A. No, but quite a sized storm.

He further stated that a seaworthy vessel fully loaded could stand the weather from January 7th through January 9th.

Robert M. Kinzebach is a meteorologist by profession who had three years' service as a weather officer, *five years* with the Pan American Airways forecasting between Seattle and Alaska and about three years in the Weather Bureau in Seattle. After an extended examination as to the character of the weather when the PENNSYLVANIA was sunk compared to that of his long study of weather conditions in this area, he testified:

Q. All right, sir. How would you characterize the Pennsylvania storm, Mr. Kinzebach?

A. Well, it was—I wouldn't say a typical winter storm, but it was not an unusual one.

Remembering that the wind velocity of the storm in which the PENNSYLVANIA was lost was 9, his further testimony is pertinent.

Mr. Gearin: Q. During the period of time that you have made your investigation will you tell the Court how many times wind forces of *10 or over* were recorded? [Emphasis added.]

A. There was 133.

Mr. Gearin: Q. How many times during that period of time was the wind force in excess of 11 reported.

A. 43.

Concerning the wind force reported by the ship at 9, the Company's own Marine Superintendent, Captain Dyer, stated:

> Mr. Levinson: From your experience as a Master Mariner and as Port Captain, a Force 9 wind with heavy and confused seas is nothing unusual in the North Pacific in January is it?
>
> A. No.

Chief Engineer Vallet, the Port Engineer for twelve years, testified that the Company's ships suffered "heavy weather damage on practically all the voyages," and when asked about the following weather

> "Force of winds 7 to 8, 8 and 8 to 9, seas described as follows, 'very rough west by south sea, long high west by south swell, very high swell, heavy confused west—heavy confused south to west swell, vessel rolling and pitching heavily at times, seas too rough to maintain original course. . . .'"

he answered

> "That is just a vessel going through a regular storm which happens practically on all voyages."

The evidence further shows that there were sixteen other ships in the same storm all of which rode it safely through though some were badly battered.

The appellant contends that we must weigh against all this viva voce testimony, a great amount of testimony by deposition from which the court could have held the storm was of such overwhelming proportions that it amounted to a peril of the sea. We cannot say the court's finding was clearly erroneous.

The Company maintained its burden of proof that it was not privy to and lacked knowledge of any unseaworthiness of the vessel. It is contended by the Cargo that the ship being held unseaworthy as to its hull, stearing gear and stowage of its deck cargo, the court erred in its finding that this was not known to the owners making them privy to her unseaworthiness prior to her departure on the fatal voyage. The parties agreed that the representative of the Company whose privity to or knowledge of the vessel's unseaworthiness must be imputed to it was its port engineer Vallet, who had been their acting marine superintendent for about two months during the illness of his superior, marine superintendent Dyer.

The district court held that the vessel was unseaworthy, stating:

"IV.

The contributory facts responsible for the sinking of the S.S. Pennsylvania are found in the radiograms sent from the vessel immediately prior to her sinking, stating that the vessel sustained a crack down the port side between frames 93 and 94; that the crack started in the sheer strake and ran down about 14 feet; that the sea water entered the engine room of the vessel through this crack; that the vessel sustained a failure or breakdown of its steering systems and for a time the vessel was completely unable to steer by any method in heavy seas then existing and that if they could not fix the steering gear that they would need immediate assistance; that the vessel was taking water in the No. 1 hold; that the deck cargo on the forward deck came adrift and was taking off the tarpaulins on the forward hatches, and that the No. 2 hatch was open and full of water.

V.

That the foregoing faults, failures, breakdowns and defects set forth in the preceding finding IV, together

with the crack sensitiveness of the vessel to extreme cold weather by reason of a former 22-foot crack in her deck occuring on her previous Voyage V. which crack was fully repaired, were factors of unseaworthiness culminating from the unseaworthy condition of the vessel at the inception of her voyage which prevented her from meeting the expected and to be anticipated weather conditions and proximately caused her sinking, with the total loss of the vessel, with all of her crew and personnel aboard and all of her cargo.

We think there is ample evidence supporting these findings, and the further finding that due diligence was not used to make the PENNSYLVANIA seaworthy for this winter voyage. The Company is not entitled to the complete exoneration from liability under 46 U.S.C. § 1304, and the question remains whether it can limit its liability to the vessel's pending freight under 46 U.S.C. § 183 (a), as amended subsequent to the enactment of § 1304, the pertinent portions of which are:

"(a) The liability of the owner of any vessel, . . . for any . . . loss . . . of any property, goods, or merchandise shipped or put on board of such vessel . . . without the privity or knowledge of such owner or owners, shall not . . . exceed the amount or value of the interest of such owner in such vessel, and her freight then pending."

With regard to Superintendent Vallet's knowledge of the defect in the steering mechanism, there is evidenc that none had been reported to him prior to the vessel's last voyage. There had been operational checks by the Coast Guard, and tests while at sea by officers, who did not report any defects to Vallet. The Coast Guard inspectors, who apparently checked the steering gear fully short of dismantling the equipment, testified that it was in good condition. The American Bureau Surveyor agreed.

As to his knowledge of the "crack sensitivity" of the vessel, the previous crack in her deck plates had been completely repaired. Fragments of her steel were sent to the National Bureau of Standards, and a metallurgist of the Bureau testified that its tensile properties were better than the requirements in effect when the ship was built. The crack on the port side and the taking of water in the No. 1 hold are not imputable to the knowledge or privity of Vallet.

As to Vallet's knowledge of the stowage of the ship, that was entirely outside of his duties, the captain having entire charge of it. It is not suggested that there was such an obvious defect in the stowage of the deck cargo that one who looked at the vessel as she lay in the dock must necessarily have known its deck cargo would come adrift in a heavy sea.

The decree limiting the Company's liability, is affirmed.

(Endorsed:) Opinion. Filed May 31, 1957.

Paul P. O'Brien, Clerk.

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 15,131

Nov. 15, 1957

STATES STEAMSHIP COMPANY, a corporation, *Appellant*,

vs.

UNITED STATES OF AMERICA, ATLANTIC MUTUAL INSURANCE COMPANY, PACIFIC NATIONAL FIRE INSURANCE COMPANY and THE DOMINION OF CANADA, *Appellees*.

ATLANTIC MUTUAL INSURANCE COMPANY, *Appellant*,

vs.

STATES STEAMSHIP COMPANY, a corporation, UNITED STATES OF AMERICA and THE DOMINION OF CANADA, *Appellees*.

PACIFIC NATIONAL FIRE INSURANCE COMPANY, *Appellant*,

vs.

STATES STEAMSHIP COMPANY, a corporation, UNITED STATES OF AMERICA and THE DOMINION OF CANADA, *Appellees*.

UNITED STATES OF AMERICA, *Appellant*,

vs.

STATES STEAMSHIP COMPANY, ATLANTIC MUTUAL INSURANCE COMPANY, PACIFIC NATIONAL FIRE INSURANCE COMPANY and THE DOMINION OF CANADA, *Appellees*.

THE DOMINION OF CANADA, *Appellant*,

vs.

STATES STEAMSHIP COMPANY, ATLANTIC MUTUAL INSURANCE COMPANY, PACIFIC NATIONAL FIRE INSURANCE COMPANY and THE UNITED STATES OF AMERICA, *Appellees*.

Upon Petitions for Rehearing

Before STEPHENS, Chief Judge, DENMAN and POPE, Circuit Judges.

POPE, Circuit Judge:

Following our decision in this case on May 31, 1957, all of the parties filed petitions for rehearing. The petition of States Steamship Company is denied. Upon consideration of the petitions of the United States and of Atlantic Mutual Insurance Company, Pacific National Fire Insurance Company and The Dominion of Canada, that portion of our former opinion which affirmed the decree limiting liability is withdrawn and this opinion is substituted therefor. The remainder of our former opinion, rejecting the appeal of States Steamship Company, stands.

The details of the sinking of the S. S. Pennsylvania, out of which these proceedings grew, are stated in our former opinion, (.... F. 2d ....). As there disclosed the vessel sailed on January 5, 1952, on what was designated her Voyage 6, from the Port of Seattle for the Port of Yokohama. She sank during a storm in the Gulf of Alaska, with a total loss of the vessel and all of her crew. The appeals here are by States Steamship Company, owner and operator of the vessel, from the portion of the interlocutory decree denying exoneration, and by the other named parties, cargo claimants, from that part of the decree granting limitation of liability.

A further study of the record here presented convinces us not only that the findings of the court below are insufficient to support a decree limiting liability, but that States Steamship Company failed to sustain its burden of proof to warrant a limitation of liability. It clearly shows that the unseaworthiness which the court found to be the cause of the loss, and due to the owner's lack of due diligence, was with the privity or knowledge of its managerial employees.

First note the findings themselves: In Finding III it is said that "The sole and proximate cause of the sinking of the Pennsylvania" was "her own unseaworthiness." This is followed by Finding IV listing the contributory factors responsible for the sinking. Finding V named the factors of unseaworthiness existing at the inception of the voyage as follows:

> "That the foregoing faults, failures, breakdowns and defects set forth in the preceding Finding IV, together with the crack sensitiveness of the vessel to extreme cold weather by reason of a former 22-foot crack in her deck occuring on her previous Voyage V, which crack was fully repaired, were factors of unseaworthiness culminating from the unseaworthy condition of the vessel at the inception of her voyage which prevented her from meeting the expected and to be anticipated weather conditions and proximately caused her sinking, with the total loss of the vessel, with all of her crew and personnel aboard and all of her cargo."

Then follows Finding VI which is the significant one here and which is as follows:

> "That the evidence is insufficient to show that petitioner used the due diligence required by law to make the vessel seaworthy at the inception of her voyage, and the Court finds that the petitioner did not use the due diligence required by law to make the vessel seaworthy and to entitle it to exoneration from liability."

It is noted that the finding is that there was no showing that *petitioner* used due diligence which was required and that *petitioner* did not use due diligence to make the vessel seaworthy. There is no finding here or elsewhere that the lack of due diligence or negligence was that of any person of less than managerial rank. On the contrary, the finding is that the lack of due diligence was that of the petitioner.

In the second paragraph of our former opinion we stated that the court held "that the employees of the company had not exercised due diligence." That statement needs modification. That was not the trial court's holding, and it could not so hold, if the word "employees" means employees of less than managerial rank.

It is obvious that Finding VII is completely inconsistent with Finding VI just quoted. Finding VII is as follows:

> "That the evidence is sufficient to show that the unseaworthy condition of the vessel at the inception of her voyage was without the privity or knowledge of petitioner, and the Court finds that the unseaworthy condition of the vessel at the inception of her voyage was not with the privity and knowledge of the petitioner."

Before there could be a finding or conclusion such as Finding VII there would have to be a finding based on evidence that the negligence which the court found existed was that of a non-supervisory agent such as a master or an operating engineer.

It is found that the unseaworthy condition was due to petitioner's lack of due diligence, but the findings fail to point to any individual, not a managerial employee, who it could be said was solely responsible for this lack of due diligence. This was a fatal defect in the findings and it exposes a lack of basis for the court's conclusion that there should be limitation of liability.

For application here is the Limitation of Liability Act, which provides in § 183(a) of Title 46: "The liability of the owner of any vessel, . . . for any . . . loss of any property, goods, or merchandise shipped or put on board of such vessel . . . without the privity or knowledge of such owner or owners, shall not . . . exceed the amount or value of the interest of such owner in such vessel, and her freight then pending." As indicated in Coryell v. Phipps, 317 U.S. 406, 409, the burden of proof in such cases "is on

those who seek the benefit" of the section. As there stated, and hereafter noted, "liability may not be limited under the statute where the negligence is that of an executive officer, manager or superintendent whose scope of authority includes supervision over the phase of the business out of which the loss or injury occurred."

The reason there is no basis for the limitation here is that the only person whose negligence could have operated to bring about the unseaworthy condition, the only persons to whom the lack of due diligence could possibly be charged, were persons who were managing officers of the corporation. The court not only did not find that the failure to exercise due diligence was that of minor or subordinate employees, but the court could not have made such a finding.

The only persons who were on the scene and had anything to do with these factors of unseaworthiness were managerial employees. The phase of the business out of which the loss or injury occurred included the "factors of unseaworthiness" which the trial court in its Finding V, supra, found caused the sinking of the Pennsylvania. We are of the opinion now, as we decided before, that there was ample evidence supporting that finding. One of those factors was "the crack sensitiveness of the vessel to extreme cold weather by reason of a former 22 foot crack in her deck occurring on her previous Voyage V."

To illustrate how the only possible proof of lack of due diligence which the court has found related to acts or neglects chargeable to supervisory personnel only we first consider this crack sensitiveness of the vessel to extreme cold weather, and the evidence relating to it.

Lester A. Vallet was throughout the period of time here involved port engineer of the company. As he put it: "I am in charge of the maintenance and repair of all the vessels." During the month or two preceding the loss of the Pennsylvania (and at the time she was cleared for sailing on her fatal trip), Vallet was also performing the

additional duties of the marine superintendent who was away at the time. Vallet was the officer charged with an extensive investigation of the vessel in December, 1950, shortly before the petitioning company purchased her from the Maritime Administration. He was assisted in this by Mr. Breneke, who was assistant port engineer. Vallet drew up the specifications for certain alterations in the vessel which were made after it was purchased. It was the practice of Vallet to board a returning vessel on arrival and to examine it for damages that had occurred on the voyage.[1] On the fifth voyage of the Pennsylvania the 22 foot crack in the ship's deck, which is referred to in Finding V, occurred while the vessel was out at sea enroute from San Francisco to Yokohama. The master was asked to return to the closest and safest port and the vessel turned around and went to Portland. There the American Bureau of Shipping and the Coast Guard were called in to inspect the damage and Vallet was in attendance to inspect the survey. After the survey Vallet prepared the specifications for the repair of the crack in the deck to meet the survey's recommendations.[2] It was during this inspection that Vallet noticed an indication of a crack in the deck on the port side. He concluded that this crack was in a location similar to that on the starboard side where the long crack had originated and this

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[1] "A. Whenever a ship returns from a voyage, either myself or one of my assistants boards the vessel on arrival and discusses the general condition of the vessel with the Master, chief engineer, and we obtain a list of repairs which are requested by the vessel. Q. Voyage repairs, you mean? A. Voyage repairs, and examine any other damages that have occurred on the voyage."

[2] It was at this time that repairs were ordered for a "fracture plate No. 3 hatch" and for "emergency steering gear." The failure of the steering systems was another factor of unseaworthiness referred to in Finding IV which need not be discussed here in view of the evidence as to the factor of crack sensitiveness, although the evidence as to the factor of unseaworthiness by reason of the faulty steering gear would show Vallet's connection with it also.

portion of the plate was cut out and a circular insert plate installed instead.

When the repairs mentioned were completed and the vessel was about ready to sail, Vallet carried out an inspection and thereupon discovered there was a difficulty with the steering mechanism. (See footnote 2, supra.) Vallet himself undertook to correct this. The vessel sailed from Portland and completed her voyage 5 and at the end of that voyage Mr. Brenneke met the ship at Seattle and examined it there. It was from here that it left on voyage 6. The date of sailing was January 5. Vallet testified on deposition as follows: "After the vessel cracked on Voyage 5 and she came back did you make any particular detailed inspection of the hull to see if there were other cracks anywhere on the port side? A. Mr. Brenneke was instructed to examine the ship very carefully at the time the vessel came back in Seattle and was placed on the dry dock."

All these facts lead to the conclusion that Vallet and Brenneke, both of them managerial employees or officers, between them handled every phase of the business having to do with the crack sensitiveness of the vessel and the condition of the vessel at the time she broke land on her scheduled No. 6 trip. As Vallet testified; "I was in charge of the Marine Department which in addition to the maintenance and repair of the vessel, also is charged with the obtaining of personnel and the officers for the ships and maintaining the discipline on the vessels and also supplying and storing the ships."[3] Brenneke was his No. 1 assistant, and as Vallet testified with respect to Brenneke dispatching the vessel from Seattle, "Mr. Brenneke is fully qualified and he knows the procedure to follow." There is no suggestion, much less any testimony, that any person other than these two men had anything

[3] This testimony referred to his total duties during the period just previous to the departure of the vessel, the trip No. 6, when he was acting as marine superintendent.

to do with the phase of the crack sensitiveness of the boat which was one of the causes of loss. These two executives were the sole actors.

It cannot be said that the crack on the port side and the taking of water in the No. 1 hold were not imputable to the knowledge or privity of Vallet, for the trial court has not only found that these "factors of unseaworthiness culminating from the unseaworthy condition of the vessel at the inception of her voyage caused her sinking", but it has found that "petitioner did not use the due diligence required by law to make the vessel seaworthy." This language necessarily refers to Vallet. For the reasons set forth in McAllister v. United States, 348 U.S. 19, we cannot go beyond that finding. And that finding, in that plain meaning, is supported by an abundance of evidence.

This brings us to the evidence relating to the crack sensitiveness. Vallet knew a great deal about crack sensitiveness. Not only did he have actual knowledge of the subject but there was available to him and to any one who exercised ordinary care in this position an abundance of information to demonstrate what the court has found, namely, that there was a crack sensitiveness in the vessel by reason of a former crack which made the ship unseaworthy under conditions of extreme cold weather.

Within the meaning of the section of the statute limiting liability, "knowledge means not only personal cognizance but also the means of knowledge—of which the owner or his superintendent is bound to avail himself—of contemplated loss or condition likely to produce or contribute to loss, unless appropriate means are adopted to prevent it." The Cleveco, 6 cir., 154 F. 2d 605, 613. The burden is upon the owner seeking limitation of liability "to prove lack of knowledge or of the means of knoweldge on his part or that of his marine superintendent that his vessel was unseaworthy." Id. "The measure in such cases is not what the owner knows, but what he is charged with finding out." Great Atlantic and Pacific Tea Co. v. Brasileiro, 2 cir., 159 F. 2d 661, 665.

The finding that the vessel had a crack sensitiveness in extreme cold weather is based in part upon the findings made in 1946 of a board of investigation convened by order of the Secretary of the Navy to inquire into "The Design and Methods of Construction of Welded Steel Merchant Vessels." Among those findings was one that "The highest incidence of fracture occurs under the combination of low temperature and heavy seas." Vallet testified that he knew that report and had read it over at various times. He stated that he agreed with the finding quoted. The same report dealt with the tendency of a ship to have repeated casualties involving cracks and steel failures, and concludes: "The indication is that after a ship has had a casualty, it is somewhat more liable to a casualty than before the first."[4] Vallet also knew and testified that this

[4] This whole report which had not only been read by Vallet but which must have been required reading for all persons in the shipping industry having to do with ship maintenance, was sufficient to alert any reader to the necessity of care and caution in the handling of welded steel ships such as the Pennsylvania. It points out that welding was a relatively new process in the building of ships—a process which was still in the course of intensive study by the shipping industry generally because of the marked tendency of ships so constructed to develop fractures, to a degree unknown in respect to riveted ships. It points out that while the welding processes had great advantages with respect to speed of construction, and had served to make the wartime accelerated ship building possible, yet among the disadvantages of such construction were the bewildering phenomena with respect to fractures. In short, it would appear from a reading of this and other available studies on the subject, that a maintenance executive in the shipping industry in the exercise of due diligence should be as concerned about the problems of likelihood of fracture or of crack sensitiveness in this type of vessel as were the experts who compiled these studies.

Vallet testified that this 1946 report was followed by a second report and then by a third report by a ship structure committee

22 foot crack during the No. 5 voyage "was a No. 1 casualty". As explained in the investigative report referred to above, a Class 1 casualty "is a casualty involving at least a Class 1 fracture"; and a Class 1 fracture "is a fracture which has weakened the main hull structure so that the vessel is lost or is in a dangerous condition."

Not only was Vallet chargeable with knowledge when the Pennsylvania was dispatched on the No. 6 voyage on January 5, 1952, that she was a ship which had previously suffered a Class 1 fracture, that a ship which has had such a casualty was more liable to a repetition of fracture than before the first, but he had read and must have known the finding of the 1946 report that the highest incidence of fracture occurs when the combination of low temperature and heavy seas prevails. He had Brennecke knew that the ship was setting out in what was perhaps the coldest month of the year, and that most of the skippers would choose to take the Great Circle route to the Orient, for which the vessel was bound. He knew that on this Great Circle route violent storms, low temperatures and mountainous seas were to be anticipated at that time of the year, particularly in the Gulf of Alaska. When the Class 1 fracture occurred on the preceding voyage the air and sea temperatures were much less severe than those to be

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convened by the Secretary of the Treasury and whose report dated November, 1953, was also an exhibit in the case below. The latter report contains descriptions and photographs of a similar crack which developed on the "Joplin Victory" at the time when the States Steamship Company was operating her. It develops at great length the proposition mentioned in the preceding report that low temperatures have an important bearing on the brittleness and tendency to fracture of steel components of these welded structures which it terms a basic concept in this field. It says under the heading of "Fundamental Investigations": "As has already been mentioned, the ability of a welded structure, such as a ship, to deform and thereby absorb energy is considered a measure of its serviceability. The realization that, as temperature is lowered, the stucture can suddenly lose ductility (at the transition temperature) becomes particularly important."

anticipated at the start of the voyage No. 6. A witness from the Bureau of Standards testified at the trial with respect to a sample plate taken from the Pennsylvania: "Would this plate here be sensitive in weather 30 to 40 degrees? A. It would." Vallet must have known as much. It is altogether possible that the captain did not know, as his superiors did, of the danger of operating a welded ship which had previously suffered a Class 1 fracture through an area where he was likely to encounter extreme cold and high seas. But the likely operation of the desire on the part of the captain to take the shorter Great Circle route made the more imperative the obligation of the owner to advise the captain of the advisability of avoiding operating a crack sensitive ship in these areas, and to direct that the ship be taken to her desination in Japan by a route through warmer waters where the likelihood of severe storms would have been less.

For this reason this case cannot be distinguished from the Silver Palm, 9 cir., 94 F. 2d 776, in which this court approved the district court's denial of limitation where a collision was caused by a condition of the ship's motors which required an extraordinarily long time for reversing in an emergency when the vessel was going at high speed ahead. The court found that the captain did not know of this peculiarity of the engines. The petitioner did not acquaint the captain of these reversing characteristics of the engine. This court said (p. 779): "The likely operation of the desire on the part of the captain to reach and depart from his various ports in accordance with the scheduled plan of operation made the more imperative the obligation of the owner and operator to advise Capt. Cox of the fact that, if he were running the vessel in a fog at a speed in excess of 5 knots, his vessel, unlike those otherwise driven, would have a very long period between the stopping of his motors and effective reversing."

The situation here is like that present in Spencer Kellog Co. v. Hicks, 285 U.S. 502, 510. In that case Spencer

Kellogg manufactured linseed oil. It owned and operated the "Linseed King" a launch used to ferry employees across the river from New Jersey to New York. One Stover was works manager of the company. The "Linseed King" was unfit to run through ice and Stover knew it and when there was a likelihood of ice, trips were to be made only in broad daylight. Before the day in question, one of Stover's subordinates had observed ice in the river. Said the court, (p. 510): "Before allowing the ferriage operation he (Stover) was under obligation to assure himself by inquiries or by personal inspection that the 'Linseed King' should not incur the hazard of colliding, as she did, with ice floes in the river . . . (p. 512) The conditions on the morning in question could have been ascertained by Stover, if he had used reasonable diligence, and we think the evidence is adequate to support the finding that the negligence which caused the disaster was with his, and therefore with the owner's privity or knowledge." Paraphrasing this language, it seems plain that before allowing the start of voyage 6 Vallet was under obligation to assure himself by inquiries or otherwise that the Pennsylvania should not incur the hazard of proceeding by the Great Circle route in the coldest and stormiest month of the year where she was certain to encounter temperatures which she could not stand. These hazards could have been ascertained by Vallet if he had used reasonable diligence; and the court below has found that reasonable diligence was not exercised. The court also found in Finding V that the weather referred to was "the expected and to be anticipated weather conditions."

Much is made by the petitioning company of the fact that from time to time inspections and surveys were made of the ship by the Coast Guard and the Bureau of Shipping, and that the inspectors had turned up with a clean bill of health. An examination of the actual facts of the case will show, however, that in respect to such inspections the very reas[illegible] given in the Silver Palm, supra, for denying

the limitation of liability apply here in connection with the modes of inspection adopted. When the vessel was at Portland for repair of the 22 foot crack in November, 1951, the vessel was not in dry dock and only a portion of the cargo was removed so as to permit repair and inspection of the immediate area of the crack. The vessel then went to the Orient and back and was dry docked at Seattle by representatives of the American Bureau of Shipping and the Coast Guard.

Vallet did not examine the vessel personally in Seattle but Brenneke was there. He made a visual inspection of the underwater body which he testified was done in the customary manner. He found no wasted or suspicious seams or broken paint or cracks or indents from which a crack might originate. He had a probe but had no hammer. While the vessel was in dry dock representatives of the American Bureau of Shipping and of the Coast Guard made a dry dock inspection; but as Commander Hamilton testified, when he made his inspection, he had received no special information about this vessel. His report showed, and he testified, that there was not a complete investigation made of the structure of the vessel to determine if repairs or replacements were necessary because some portions of the internal structure were not accessible for examination.

Marine Surveyor Wilson who then inspected the ship for the American Bureau of Shipping testified that he received no special information concerning the vessel prior to his survey and he knew nothing outstanding against it. The record warranted the court's evident conclusion that an inspection of a vessel known to have a history of crack sensitiveness and particularly a history of a Class 1 fracture, should be much more careful and elaborate than this vessel ever had. The company itself was chargeable with knowledge of the pending inspection and yet it failed through Vallet or Brenneke or any other person to inform the inspectors of these special conditions attending the

ship. In the words used in the Silver Palm, supra, all these circumstances "made the more imperative the obligation of the owner and operator to advise" of the special circumstances calling for a special inspection and a more thorough one than had been given.

Vallet met the vessel when she put in at Portland following the fracture on trip 5 and Brenneke at Seattle met her in December, 1951, when she returned after that trip and inspection occurred as above stated. It was a matter of common knowledge that the structure should have been inspected from within and below, particularly in the vicinity of the pad-eyes where cracks were apt to start. Vallet testified that at the time he made the specifications for repairs of the 22 foot crack he also ordered repair of "fracture plat No. 3 hatch; cut out crack plate in the way of the No. 3 hatch port side aft and install insert plate." He explained that he ordered this because from an underneath inspection he saw an indication of a slight crack in the way of a pad-eye which had been removed. It was a very small crack but at a point on the port side similar to the place where the large fracture had occurred on the starboard side.

Notwithstanding Vallet's knowledge of the importance of inspection of the hull under pad-eyes and from the inside, there was never possible a thorough inspection of this character after the 22 foot crack on voyage 5 and before the vessel left on voyage 6 because the ship was never unloaded and those portions of the vessel requiring such inspection was never made accessible.

Our former opinion, speaking of Vallet's knowledge of the condition of the vessel, said: "The previous crack in her deck plates had been completely repaired." This language discloses that we failed then to note the facts to which the court's finding as to the vessel's unseaworthiness related. The crack sensitiveness referred to in the findings had nothing to do with the question of whether the old crack was or was not repaired. The crack sensitiveness

alluded to is "the crack sensitiveness of the *vessel* to extreme cold weather." In short, the technical evidence made available in these reports means that the record of the earlier crack or Class 1 fracture, is significant in respect to the crack sensitiveness in other portions of the vessel.

The more one studies the history of the Pennsylvania, the more he is driven to the discovery of additional facts which enforce the correctness of the trial court's finding that the petitioner did not exercise due diligence. The ship was equipped and built with some deep tanks, and there was adequate evidence to show that these deep tanks were so constructed as to aid and enforce the rigidity of the ship. When the petitioning company bought the ship from the Maritime Administration it was advised through Vallet not to interfere with these deep tanks. Vallet nevertheless proceeded to cut hatches in them. Prior to that time the Pennsylvania had never developed a major fracture. Thereafter she proceeded to develop the Class 1 fracture on her fifth voyage.

Another circumstance that may have prompted the trial court to find that the petitioner company did not use due diligence to make the vessel seaworthy at the inception of her voyage, was the manner in which Vallet apparently took little or no interest in the metallurgical tests of the ship's steel following the voyage 5 crack. Vallet was asked whether he or the company caused any test of the hull plate or deck plate to be made. His first answer, not responsive, was: "It was not necessary." Being pressed for a more specific answer, he said that the American Bureau of Shipping and the Coast Guard had requested a specimen of the steel removed in the way of the crack for testing purposes; that he himself never made any request for such testing. He was asked "You did not consider it was necessary to have a metallurgist look at the steel and the crack that occurred on Voyage 5?" to which he answered: "That was taken care of by the United States Coast Guard and Ameri-

can Bureau of Shipping," adding that they were better qualified than any other metallurgist. The witness did not know, however, whether these organizations did or did not conduct tests and he received no report of any test.

That exposes a situation to which is applicable our language in the Silver Palms, supra, where we said (p. 780): "In proceedings for limitation the owner may not escape liability by giving the managerial functions to an employed person acting as its agent, whether the person be corporate or otherwise." Nor can the company escape responsibility for taking due precaution reasonably required by the apparent dangers by a mere reliance upon an assumption that the Coast Guard and the American Bureau of Shipping have taken care of these matters.

In view of the court's own finding, which is not open to challenge, that the petitioner did not use due diligence as required by law to make the vessel seaworthy, what we have here said serves to disclose that that finding was abundantly supported by the evidence, and it also discloses that this lack of due diligence necessarily attached to the petitioner and not to any subordinate employees of petitioner. All this makes it unnecessary to discuss the other factors of unseaworthiness set forth in the trial court's findings.

We hold that it was error to enter a decree limiting the liability of States Steamship Company and that portion of the interlocutory decree awarding such limitation of liability is reversed and the cause is remanded to the district court for further proceedings consistent with this opinion.

(Endorsed:) Opinion on Petitions for Rehearing. Filed Nov. 15, 1957.

Paul P. O'Brien, Clerk.

APPENDIX E

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

August 20, 1958

No. 15,131

STATES STEAMSHIP COMPANY, a corporation, *Appellant*,

vs.

UNITED STATES OF AMERICA, ATLANTIC MUTUAL INSURANCE COMPANY, PACIFIC NATIONAL FIRE INSURANCE COMPANY and THE DOMINION OF CANADA, *Appellees*.

ATLANTIC MUTUAL INSURANCE COMPANY, *Appellant*,

vs.

STATES STEAMSHIP COMPANY, a corporation, UNITED STATES OF AMERICA and THE DOMINION OF CANADA, *Appellees*.

PACIEIC NATIONAL FIRE INSURANCE COMPANY, *Appellant*,

vs.

STATES STEAMSHIP COMPANY, UNITED STATES OF AMERICA and THE DOMINION OF CANADA, *Appelles*.

UNITED STATES OF AMERICA, *Appellant*,

vs.

STATES STEAMSHIP COMPANY, ATLANTIC MUTUAL INSURANCE COMPANY, PACIFIC NATIONAL FIRE INSURANCE COMPANY and THE DOMINION OF CANADA, *Appellees*.

THE DOMINION OF CANADA, *Appellant*,

vs.

STATES STEAMSHIP COMPANY, ATLANTIC MUTUAL INSURANCE COMPANY, PACIFIC NATIONAL FIRE INSURANCE COMPANY and THE UNITED STATES OF AMERICA, *Appellees*.

On Petition of Appellee States Steamship Company for rehearing on Limitation.

Before STEPHENS, DENMAN and POPE, Circuit Judges.

PER CURIAM:

On May 31, 1957, this court handed down an opinion in this case which affirmed the decision of the trial court rejecting the claim of appellant States Steamship Company for exoneration from liability for loss resulting from the sinking of the S.S. Pennsylvania, and granting its claim for limitation of liability. Thereafter all parties filed petitions for rehearing. Upon consideration of those petitions the court withdrew its former decision of May 31, 1957, and on November 15, 1957, substituted a new opinion which upheld the appeals of the appellant insurance companies, the United States, and the Dominion of Canada, from the decree limiting liability of States Steamship Company. Thereafter States Steamship Company filed a further petition for rehearing and upon invitation of the court, the insurance companies, the United States and the Dominion of Canada filed briefs in answer thereto, to which the Steamship Company has filed a reply.

Our further study of the points raised by this petition for rehearing convinces us that whether it be our fault, or otherwise, our decision of November 15, 1957, has been misunderstood, and we now make this further effort to clarify the basis for that decision.

Our opinion stems from the findings of the district court. We take those findings and then inquire, in view of the whole record, what those findings require. They are:

1. ". . . the sole and proximate cause of the sinking of the Pennsylvania being her own unseaworthiness." (Finding III).

2. ". . . the contributory factors responsible for the sinking of the S.S. Pennsylvania are found in the radiograms sent from the vessel immediately prior to her sinking, stating that the vessel sustained a crack down the port side between frames 93 and 94; that the crack started in the sheer strake and ran down about 14 feet; that sea water entered the engine room of the vessel through this crack." (Finding IV) (The finding also listed a failure of the steering system; the taking of water in the No. 1 hold; the coming adrift of the deck cargo; and the No. 2 hatch being open and full of water.)

3. "That the foregoing faults, failures, breakdowns and defects set forth in the preceding finding IV, together with the crack sensitiveness of the vessel to the extreme cold weather . . . were factors of unseaworthiness culminating from the unseaworthy condition of the vessel at the inception of her voyage." (Finding V)

4. The crack sensitiveness mentioned was "by reason of a former 22-foot crack in her deck occurring on her previous Voyage V, which crack was fully repaired." (Finding V)

5. This unseaworthy condition "prevented her from meeting the expected and to be anticipated weather conditions." (Finding V)

6. This unseaworthy condition "proximately caused her sinking with the total loss of the vessel." (Finding V)

7. "That the evidence is insufficient to show that petitioner used the due diligence required by law to make the vessel seaworthy at the inception of her voyage, and the Court finds that the petitioner did not use the due diligence required by law to make the vessel seaworthy and to entitle it to exoneration from liability." (Finding VI)

We accepted these findings and held that States Steamship Company had not sustained its burden of proving that it was entitled to a limitation of liability, saying:

"The reason there is no basis for the limitation here is that the only persons whose negligence could have operated to bring about the unseaworthy condition, the only persons to whom the lack of due diligence could possibly be charged, were persons who were managing officers of the corporation. The court not only did not find that the failure to exercise due diligence was that of minor or subordinate employees, but the court could not have made such a finding.

"The only persons who were on the scene and had anything to do with these factors of unseaworthiness were managerial employees."

The Steamship Company insists that we erroneously misinterpreted the trial court's findings of fact. It asserts that the court's finding VI, (No. 7, above), was a finding relating to the Steamship Company's claim for *exoneration;* that it had no relation whatever to a question of limitation of liability or the question of privity and knowledge with which the court below dealt in its finding VII.[1]

The Steamship Company argues that in drawing our conclusions we have set forth a broad rule that in any case where the Steamship Company fails to use due diligence to make the vessel seaworthy at the inception of her voyage, limitation must be denied. We did not so hold.

There is respectable authority which would warrant the holding that where the circumstances are such that the owners or managing agents have a duty to act to see that the vessel is made seaworthy, a neglect or failure to take such action will require denial of limitation. Mere instructions to subordinate employees will not suffice to

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[1] Finding VII was as follows: "That the evidence is sufficient to show that the unseaworthy condition of the vessel at the inception of her voyage was without the privity or knowledge of petitioner, and the Court finds that the unseaworthy condition of the vessel at the inception of her voyage was not with the privity and knowledge of the petitioner."

give the owner the benefit of the limitation act. Such a case was Spencer-Kellogg Co. v. Hicks, 285 U.S. 502, 510, where limitation was denied because the manager, although he had given appropriate instructions to the master, had not followed up by inquiries of personal inspection himself. The court said (p. 510): "Before allowing the ferriage operation he was under obligation to assure himself by inquiries or by personal inspection that the 'Linseed King' should not incur the hazard of colliding, as she did, with ice floes in the river. . . . The owner was therefore chargeable with negligence in not taking measures for the safety of the passengers which the weather conditions required."[2] Mere nonaction on the part of managing agents in their allowing subordinates to prepare a ship for departure will not serve to excuse the owner from any portion of his responsibility if the knowl-

[2] See Gilmore, Black, "The Law of Admiralty", 1957, p. 701: "Some duties appear to be 'nondelegable', which is a way of saying that the corporation will be conclusively presumed to have 'privity or knowledge' of the breach, or, more directly, that the corporation will not be entitled to limit its liability in such a case no matter what the state of proof on actual privity or knowledge. "The nondelegable duties are all facets of what is referred to in other contexts as the shipowner's duty to provide a seaworthy ship or at least to use due diligence to do so. 'Seaworthiness' is a word which in recent years has suffered from a strange expansion of meaning. Its primitive sense was no doubt what any English-speaking person, not a member of the admiralty bar, would expect it to mean today: that the ship in question must be, in the language of the customary charter-party warranty 'tight, staunch, strong and well and sufficiently tackled, appareled, furnished and equipped.' If a corporate owner fails to use due diligence to send forth his ship seaworthy in that primitive sense, and the unseaworthiness proximately causes loss or damage, the owner will be denied limitation. The corporate owner, unlike the individual owner, will not be allowed to escape liability for breach of his basic duty by delegating either to a master or to subordinate shore officials." (Emphasis added) The authors cite as authority for this position, Grace & Co. v. Charleston Lighterage & Transfer Co., 193 F. 2d 539, 1952 A.M.C. 689 (4th cir. 1952).

edge of the managing agent is such that they ought to inquire and inspect. Williams S. S. Company v. Wilbur, 9 cir., 9 F. 2d 622.[3]

There is no doubt that Vallet, the port engineer, did have a duty to make inquiries and personal inspection at the time the Pennsylvania started her voyage. But that circumstance was not alone the basis for our decision. The court's finding of lack of due diligence, it is true, refers to exoneration.[4] But it must necessarily be related to the facts of this particular case. Here one of the factors of unseaworthiness was the crack sensitiveness of the vessel and it in turn existed by reason of a former 22 foot crack in her deck. It is not material here whether the words "by reason of" were meant to say that the former crack caused the later crack, or whether the meaning is simply that her crack sensitiveness was revealed by the former 22 foot crack. In any event, and as a simple fact found by the court, the vessel was unseaworthy and

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[3] This and other similar cases were explained by Mr. Justice Brandeis in Erle & Stoddart v. Wilson Line, 287 U.S. 420, 427, in a footnote as follows: "In all the cases where immunity from liability for damage by fire was held to be lost because of neglect of the owners, the courts have based their finding of neglect on the action of the owners, or managing agents, or upon their failure to see that action was taken where it was their duty to act."

[4] We did not question that in making its finding VI, quoted above, the court below had in mind the provisions of section 3 (1) of the Carriage of Goods by Sea Act providing: "The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to . . . (a) make the ship seaworthy", and section 4 (1) providing that neither carrier nor ship shall be liable for loss resulting from unseaworthiness "unless caused by want of due diligence on the part of the carrier to make the ship seaworthy . . . in accordance with the provisions of paragraph (1) of section 3." Of course, in making such a finding, a court in some other case might well predicate its finding of failure to use due diligence upon evidence that the negligence or fault was that of any agent whatever, regardless of rank, provided the agency was sufficient to give rise to an application of the rule of respondent superior.

was in part unseaworthy because of the crack sensitiveness.

The question next is: whose lack of due diligence sent a ship thus unseaworthy to sea? The only conclusion that any one would be entitled to draw from the evidence in this record was that Vallet was the one man so chargeable. This is not a case where it could be speculated that Vallet was off on vacation or not on duty when the failure to "use the due diligence required by law to make the vessel seaworthy", took place. Our former opinion sufficiently details what the evidence showed as to Vallet's connection with this crack problem from beginning to end and his complete knowledge of the crack sensitiveness of the vessel. It is impossible to disassociate Vallet from all of this under any possible view of the evidence. He permitted the vessel to sail on her fatal trip, and if, as the court found, there was lack of due diligence to make the vessel seaworthy in these respects, that lack of due diligence was in major part that of Vallet.

Some complaint is made that we improperly treated Mr. Brenneke as an executive officer.[5] Whether he was or not is immaterial here for in the sending forth of a ship known to have the crack sensitiveness of this one Vallet was the prime actor and for our purposes here it was immaterial whether as one who participated in that action and contributed thereto Brenneke was a managing officer or a minor employee.

It is thus apparent that the district court found there was negligence. After noting that the finding was abun-

[5] The testimony as to Brenneke, given by Vallet, was as follows: "Q. During the month of December and January of 1951 and '52 would you say that Mr. Brenneke was your assistant marine superintendent? A. He was my assistant. We don't have the title of assistant marine superintendent. Q. You were just marine superintendent; is that correct? A. Yes. Q. But you do have the title of assistant port engineer? A. Yes. Q. And Mr. Brenneke was the No. 1 man under you; is that correct? A. Yes."

dantly supported by evidence, we have by our decision pointed out that upon this record such negligence was necessarily the negligence of Vallet. Accordingly we hold limitation of liability must be denied.

The burden of proof of absence of privity or knowledge is upon the shipowner. Coryell v. Phipps, 317 U.S. 406, 409. (And see cases cited in Gilmore and Black, p. 705). Our holding is, like that in Triple A Machine Shop v. Waterman Steamship Corporation, 9 cir., 221 F. 2d 916, that "the shipowner did not sustain its burden of proof."

This privity or knowledge which results from Vallet's connection with the preparation of the vessel for departure results in part from the principles underlying the limitation act itself. In Spencer-Kellogg Co. v. Hicks, supra, p. 511, the court noted the necessary distinction between the shipowner's responsibility for the neglect of sea-going employees and his responsibility in respect to his shoreside organization. Meeting an argument that in that case the fault was that of a competent master to whom instructions had been given and that the owner had done its full duty, the court said: "Cases such as La Bourgogne, 210 U.S. 95, which involved the master's failure to obey rules and instructions when on the high seas and disaster attributable to such fault, are cited. But there is a vast difference between the cases relied on and the instant one. The launch was used for ferriage over a distance of about a mile and a third. She was known to be unseaworthy and unfit if there was ice in the river. There is no analogy between such a situation and that presented in the cited cases where the emergency must be met by the master alone. In these there is no opportunity of consultation or cooperation or of bringing the proposed action of the master to the owner's knowledge. The latter must rely upon the master's obeying rules and using reasonable judgment. The conditions on the morning in question could have been ascertained by Stover, if he had used reasonable diligence, and we think the evidence is

adequate to support the finding that the negligence which caused the disaster was with his, and therefore with the owner's, privity or knowledge." The reason for this "vast difference" there stated, is well described by Gilmore and Black as follows (p. 696): "The principle of the Limitation Act is the same as that found in the Harter Act and the Carriage of Goods by Sea Act: because of the extraordinary hazards of seaborne commerce and because the owner can exercise only a nominal control over his 'servants' once the ship has broken ground for the voyage, the owner should be entitled to exoneration from liability, or at least to a limitation of liability, for whatever happens after the ship has passed beyond his effective control. *Contrariwise, he should be held to liability for all loss resulting from his failure to exercise effective control when he had the chance.*[6] Although the Limitation Act uses a vocabulary different from that of Harter and Cogsa, the concept of liability is the same: the shipowner is not chargeable with 'privity or knowledge' or with 'design or neglect' when he has used 'due diligence' to furnish a seaworthy ship; he is so chargeable when he has failed in his duty of 'due diligence' and has sent out a ship unseaworthy in some respect that proximately contributes to the loss."[7]

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[6] Illustrations of this failure to exercise effective control when the owner "had the chance", are found in The Cleveco, 6 cir., 154 F. 2d 605, 613: (". . . knowledge means not only personal cognizance but also the means of knowledge—of which the owner or his superintendent is bound to avail himself—of contemplated loss or condition likely to produce or contribute to loss, unless appropriate means are adopted to prevent it."), and in Great Atlantic & Pacific Tea Co. v. Brasileiro, 2 cir., 159 F. 2d 661, 665 ("The measure in such cases is not what the owner knows, but what he is charged with finding out.").

[7] The authors add the following interesting comment: "The foregoing comment is not meant to suggest that courts customarily cross-cite Limitation Act cases and Harter Act or Cogsa cases. There is indeed authority for the proposition that the Limitation

Petitioners make reference to the portions of the evidence in the record which they say tends to show that the steel of the Pennsylvania was no different from the steel of all welded ships built at the same time. Reference is made to technical reports and to testimony of witnesses who surveyed and inspected the ship or samples of her steel tending to show that there was no lack of due diligence in making the ship seaworthy. There is no question but that the record contains a substantial amount of evidence to that effect. The difficulty is that the trial court rejected it in the findings which we have quoted above. When the court found that the proximate cause of the sinking was the Pennsylvania's unseaworthiness; that the crack sensitiveness by reason of her former 22 foot crack in her deck was a factor of unseaworthiness culminating from her unseaworthy condition at the inception of her voyage and that there was a lack of due diligence to make the vessel seaworthy, it rejected the contrary evidence now cited to us in the Steamship Company's petition for rehearing.

It is suggested that there is something in our opinion to the effect that all welded steel vessels are unseaworthy. As authority for this assertion petitioner quotes from a television broadcast in which the broadcaster purports to construe the meaning of our decision. The broadcaster is mistaken; we did not so hold.

Act imposes on the shipowner a lower standard of care than do the Harter Act and Cogsa; that is, failure to have exercised 'due diligence' under under Harter or Cogsa does not automatically deprive the shipowner of his defense under the Fire Statute or the Limitation Act. No recent cases, however, have restated the doctrine of the lower Limitation Act standard. If the older cases are in time overruled or foregotten, in line with the discernible judicial trend to narrow the Limitation Act by construction, the situation would then be that, if the carrier is liable to cargo under the Harter or Cogsa, it would also lose its privilege under the Limitation Act.' As to cargo liability, then, the Limitation Act would be in effect superseded by Harter and Cogsa, and would continue to be of importance with respect to collision, loss of life and personal injury claims.''

The petition contains a table taken from one of the exhibits in the case showing the number of fractures and casualties in some 4694 ships built by the Maritime Commission. This table shows a substantial number of fractures and casualties. On the basis of this, petitioner asserts that in respect to the likelihood of cracks and fractures, the Pennsylvania was exactly like all other welded steel ships and is no different from the bulk of dry cargo tonnage in the American Merchant Marine.

But the 127 cases of serious casualties listed in this table do not contain any Victory class vessels such as the Pennylvania. The Pennsylvania was unique in its prior Class I hull fracture on Voyage V. The testimony showed that there had been over 2000 shipping years of experience with Victory ships and there was no history of a Class I casualty on such a ship. The failure of due diligence found by the court was in sending a ship known to be crack sensitive upon that voyage.

The suggestion that our decision puts all welded ships out of business over the northern route is wholly unwarranted.

The petition for rehearing is denied.

In this effort to clarify our decision we believe we have at least somewhat improved upon the statements made in our Nov. 15, 1957, opinion. It is ordered that that opinion be amended by striking therefrom the following portions:

1. The two paragraphs, appearing on page 3 of the slip sheet opinion, beginning with the words "It is noted", and concluding with the words "less than managerial rank".

2. The first sentence immediately following those paragraphs; and

3. The first paragraph on page 4 of the slip opinion, beginning with the words "It is found", and concluding with the words "limitation of liability".

(Endorsed:) Per Curiam Opinion on Petition for Rehearing. Filed Aug. 20, 1958.

Paul P. O'Brien, Clerk.

FILE COPY

In the Supreme Court
of the United States

OCTOBER TERM, 1958

No. 514

STATES STEAMSHIP COMPANY, a corporation,
Petitioner,

v.

UNITED STATES OF AMERICA, ATLANTIC MUTUAL INSURANCE COMPANY, PACIFIC NATIONAL FIRE INSURANCE COMPANY and THE DOMINION OF CANADA,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF OF PETITIONER IN REPLY TO BRIEFS OF UNITED STATES, ATLANTIC MUTUAL INSURANCE COMPANY, PACIFIC NATIONAL FIRE INSURANCE COMPANY AND THE DOMINION OF CANADA

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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 514

STATES STEAMSHIP COMPANY, a corporation,
Petitioner,

v.

UNITED STATES OF AMERICA, ATLANTIC MUTUAL INSURANCE COMPANY, PACIFIC NATIONAL FIRE INSURANCE COMPANY and THE DOMINION OF CANADA,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF OF PETITIONER IN REPLY TO BRIEFS OF UNITED STATES, ATLANTIC MUTUAL INSURANCE COMPANY, PACIFIC NATIONAL FIRE INSURANCE COMPANY AND THE DOMINION OF CANADA

STATEMENT

Since the Briefs of the United States, the Insurance Companies and the Dominion of Canada all follow more or less the same pattern of argument, the petitioner herewith replies to all of them together. A special comment, however, on the Brief of the United States, is warranted as a preface to this reply.

In an effort to disguise the holding of the Court of Appeals as one turning on the particular facts of the case, the United States emphasizes in detail some of the many facts in the record. In so doing, it not only overlooks the many contradictory facts but also obscures the substantial and important questions of admiralty law which are the very essence of the ruling below and which are set forth in the petition herein.

Thus the Government's Brief cites evidence about padeyes, steering gear, stowage of deck cargo (pp. 5-7) as if this were a trial de novo. But of course it is not. Steering gear and deck cargo were eliminated from further consideration by the Appellate Court's first Opinion (Pet. App. 17a and 18a), and never modified in those respects. We do not have to consider them. Neither do we have to consider the Government's Brief's reference to Port Assistant Engineer Brenneke as a "managerial employee." On our pointing out that the District Judge himself had characterized Brenneke as a "very minor official in the organization" (R. 1727), the Court of Appeals retreated from its previous position, declared Brenneke's status "immaterial" (Pet. App. 41a), and pinned its whole decision on Vallet and crack-sensitivity (Id.).

Nor do we have to consider padeyes. The testimony is uncontradicted that any cracks around padeyes were minor, were all repaired, were common to all ships, were not connected in any way with the crack in the port side, and, since they did not propagate, indicated good tough steel (R. 264; 404-405; 438; 445; 617-619);

623; 2743-2745; 2886). The most that can be claimed for them is that they were merely a bit of controversial evidence. Finally, it was not they which the Court of Appeals said was a warning to Vallet. It was the 22-foot crack, and that alone.

The Government's Brief says, Page 6, that on the fifth voyage another crack was discovered in the ship's "structure" and not repaired. This is misleading. The crack was a small one in an angle iron joining the bulwark rail to a stanchion at the corner of the midship house where cracks frequently occur. It was no part of the hull of the vessel at all; "had no place in the strength pattern of the ship at all"; is frequently omitted entirely, leaving an empty space at that point; was admitted by the Government's own witness at the Coast Guard's hearing "to mean nothing at all"; occurred on the homeward voyage only a few days out from Tacoma, and, quite evidently, was never reported to Vallet because the Chief Engineer rightly regarded it as of no consequence (R. 2663-2679; 2757-2758; 2827-2828; 2887-2888). Neither the Trial Court nor the Court of Appeals even mentioned it.

Despite the efforts of the United States to transpose this case into one concerning only its unique facts, the fact remains that the decision below contains several issues of great importance in the admiralty world and is in direct conflict with the pertinent decisions of this Court and other federal courts of appeals.

COURT OF APPEALS MISAPPREHENDED AND GROSSLY MISAPPLIED THE APPELLATE REVIEW STANDARD (Pet. 3)

That standard is clearly declared by Rule 52(a) F.R.C.P., recognized by the Court of Appeals as binding upon it. (Pet. App. 11a):

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

The question, therefore, on this point is simply this:

Was the Trial Court's decision granting limitation "clearly erroneous," justifying the Appellate Court in reversing it?

In considering this, it must be borne in mind that the Appellate Court's decision is narrowed down to this: The 22-foot crack was a warning to Vallet of the vessel's alleged unusual crack-sensitivity. That is all. Limitation was denied by the Appellate Court solely on that ground.

The respondents' briefs argue that the Appellate Court did not disregard the above Rule. In its first decision it did not. In its last two decisions it did. In the last decision it said:

> "Our opinion stems from the findings of the district Court." (App. E, 36a).

But it does not. If it had, it would have affirmed limitation. The reason it did not was the Court's fatal error in reading into Finding VI something that was not there, and then holding Finding VII inconsistent therewith.

Thus, after reciting the language in VI that "petitioner did not use the due diligence required by law to make the ship seaworthy," the Court said:

> "This language *necessarily* refers to Vallet. For the reasons set forth in McAllister v. United States, 348 U.S. 19, we *cannot go beyond that finding*." (App. D, 26a. Emphasis supplied.)

In short, the Court's whole opinion "stems" from a finding which it has grossly misinterpreted, and replaced with a finding of its own.

Finding VI did not refer to Vallet at all. It did not even refer to crack-sensitiveness. All it found was that petitioner, somewhere down the line, and in some unspecified respect, had been lacking in due diligence. That was sufficient to deny exoneration and was all that the trial Court was talking about.

The Appellate Court having thus erected this false barrier, "which we cannot go beyond," then proceeded to "go beyond" Finding VII granting limitation, and, although that finding was amply supported by substantial evidence, proceeded to try the case de novo and reverse the trial Court.

The whole train of error started with the initial, entirely unwarranted misinterpretation of Finding VI. The result was a complete disregard of the Rule.

EVIDENCE IN SUPPORT OF THE TRIAL COURT'S FINDING

The argument of the respondents that the Trial Court's finding was "clearly erroneous" is only another way of saying that there was no substantial evidence to support it. It therefore becomes appropriate to point out that there was a great deal of such evidence.

The Appellate Court itself, even in its final adverse opinion, admitted that "there is no question but the record contains a substantial amount of evidence" that there was no lack of due diligence in making the ship seaworthy in respect to her steel[1] (Pet. App. 44a); but adds that the Trial Court rejected it in the findings. Petitioner has already shown that the Trial Court did not reject it at all. It merely made a general finding of lack of due diligence without specifying in what respect. And since the steel was better than that in use when the ship was built, and any defect was latent, and there is no way to discover notch-sensitivity short of taking the ship apart and testing the steel in a laboratory, it can hardly be presumed that the Trial Court "rejected" that evidence as it pertained to the steel. In fact the contrary is indicated, at least so far as Vallet is concerned, when, in the very next Finding VII it granted limitation.

Following is some of the "substantial evidence" warranting the Trial Court's finding that there was no privity:

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[1] The Government's brief makes the same admission. Page 10.

1. Perhaps as important as any is the undisputed fact that the steel of the ship was better than the requirements in effect when the ship was built. The importance of this was recognized in the Court's first Opinion, by Judge Denman (Pet. App. 18a).

2. Vallet knew that "all the steel that went into that vessel met all the requirements of the American Bureau of Shipping. The steel was tested when it was manufactured and before it was installed in the vessel." (R. 272). This knowldge on Vallet's part was the same as if he had appointed the American Bureau as his agent to make these tests, and they had reported back to him the good quality of the steel. He was entitled to rely on this, and it was evidence to sustain the Trial Judge in finding no privity.

3. The 22-foot crack was fully repaired[2] to the approval of the United States Coast Guard, the American Bureau of Shipping, Lloyds, the United States Salvage Association, the Repair Yard, Vallet himself and his staff. (R. 869, 875-6; 896-7; 1123; 1130-1; 143-5; 177; 224-5; 266-9; 366, 338-9, 342, 347-9,

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[2] The Government's Brief, p. 3, says that the Board of Investigation defined a Class I Casualty as "a fracture which has weakened the main hull structure so that the vessel is lost or is in a dangerous condition." This, of course, means *before the fracture is repaired.* All the testimony is that once the fracture is repaired the ship is as good as before. The definition quoted was later changed to define a Class I Casualty as any crack more than 10 feet long (R. 1850, 1862, 2769-2770), and it was for that reason that the **PENNSYLVANIA**'s crack was classed as a Class I Casualty.

379-80). These men all considered the ship seaworthy, and Vallet was entitled to rely on the opinion of these competent experts.

4. The 22-foot crack did not weaken the vessel in other parts. It had no relation to the 14-foot crack on the side of the ship on the fatal voyage.

"Did the crack between Frames 72 and 74, in your opinion, have any influence at all in producing the subsequent crack at 93 and 94?

A. None whatever." (R. 2804, Brown).

There was much more expert testimony to the same effect. (R. 269, 299, 343, 470-71, 477, 857; 2742-3, 2764, 2804, 2884.)

Vallet was entitled to rely on this general expert opinion that the 22-foot crack had not weakened the vessel elsewhere.

5. Vallet was without notice of any defect causing the 14-foot crack. It started in a butt weld joining 2 plates, probably from a latent defect in the weld, creating a notch. No one knew of the existence of the notch. It was not discernible in spite of inspections of competent men.

6. The cause of the 22-foot deck crack was fully explained to Vallet by Captain Plover and Chief Engineer Matthews, as due to "extremely heavy weather" and "location of the deck cargo" and the tiny crack at the padeye constituting a notch. (R. 211-213). Vallet was entitled to rely on the vessel's log book (Ex. 44) and the reports of these men that the 22-foot crack was caused by these special circumstances and not by an inherent weakness in the ship.

7. After the 22-foot crack was fully repaired the vessel continued on Voyage 5 clear across the Pacific and back. On the return leg of that voyage the Chief Mate and Chief Engineer Matthews inspected the inside of all the holds "for cracks or for excessive rust or hatch boards broken, or anything." This was in accordance with regular ship's practice. This inspection showed everything satisfactory,—"Nothing wrong at all." (R. 379-380). And a report was made accordingly (R. 380). Vallet was entitled to rely on it.

8. When the ship was drydocked at Seattle before the last voyage, she was inspected by the United States Coast Guard and the American Bureau of Shipping (R. 670, 676, 692, 723, 735, 749-765), also by Chief Engineer Matthews (R. 347-349), and Assistant Port Enginer Brenneke (R. 331-335, 1715-17, 1721). All of these men were experienced and thoroughly competent and passed the vessel as entirely seaworthy. Vallet was entitled to rely on them.

(It is implied in the United States Brief, at page 7, that this inspection was not complete because the inspectors of the Coast Guard and the American Bureau of Shipping did not receive any information "of anything unusual about the vessel, including the 22-foot crack on her last voyage." There is not a syllable of testimony whether they had information of the 22-foot crack or not. The only testimony is this: One of them was asked whether he had any special information of anything "unusual" about the vessel, and he said "No," which of course was correct (R. 685). A crack that is "fully repaired" is no

longer "unusual." The other inspector was asked whether he had received any "special information" about the vessel, and said he checked the records at his office and found there was nothing "outstanding" against her (R. 769). "Outstanding" is the technical word for some item of repair that has to be attended to. When there is nothing outstanding, then the ship's record is clean. The third inspector was never asked anything about this at all. Of course Brenneke and Matthews knew all about the crack.)

9. The 1946 Report, Exhibit 185.

This Report was important evidence in the case. It is discussed in Footnote 9 of the Petition, page 18. It embodies the findings of the Board of Investigation convened by the Secretary of the Navy. Its members, admirals and technical experts, were the most eminent men in their profession. The Report deals with notch-sensitivity in welded ships. After extensive investigation the Board reported that

> "A tendency for certain ships to incur repeated casualties can be measured but the trend is not great and the effect is *not significant*." (Report, 10).

"Not significant" need no definition. It means "indicates nothing," "means nothing," "is of no consequence," "shows nothing," "signifies nothing," "can be disregarded."

This was the most expert opinion in the country. Vallet knew it (R. 209; Appellate Court's Opinion, Pet. App. 27a), and was certainly entitled to rely on it.

Mr. David P. Brown, the foremost expert to testify at the trial, and himself a member of the Ship Structure Committee which superseded the said Board of Investigation, testified to the same effect.

"Q. Does the fact that a ship has cracked—take a major crack like this crack in the deck of the Pennsylvania—does that indicate any tendency or propensity of that ship toward cracking? . . .

A. Insofar as the vessel is concerned, we have never been able to establish any significance." (R. 2743)

Vallet knew of this expert opinion, and was entitled to rely on it.

The Government's Brief says, page 14, that there is no question of "delegation" in this case. Vallet testified (which is apparent throughout the record anyway) that he relied on the reports of his officers and the American Bureau and the Coast Guard. (R. 292). That is delegation.

10. There is no evidence in the Record anywhere to sustain the Appellate Court's finding that the 22-foot deck crack was notice of notch-sensitivity. Mr. Brown says "No," (R. 2743); Captain Nordstrom says "No," (R. 2994, 2917-19); all the ship's witnesses say "No." Nobody says "Yes." Not even cargo's witness Hechtman, who admitted that the *only* reason he thought the PENNSYLVANIA "unusual" was that she suffered *two* major casualties (R. 2605, 2616). But as the second was the 14-foot crack on the fatal voyage, after the ship had left port, it obviously could be no notice to Vallet.

It is impossible to conceive how the Appellate Court could say that Vallet *knew* of the vessel's alleged crack-sensitivity. There is no evidence of it whatever.

All of the foregoing is some of the evidence, and it is all substantial, which is ample to sustain the Trial Court's Finding VII, that petitioner was without privity or knowledge; and demonstrates that the Appellate Court's first Opinion of May 31st, 1957, was correct, when it said that the Trial Court's findings were not "clearly erroneous." It follows that the Court's later opinions reversing itself are wrong, and a clear departure from the Appellate Review Standard declared by Rule 52(a).

The Appellate Court rigidly applied the Rule to Finding VI to deny exoneration, but unfairly refused to give the like treatment to Finding VII and grant limitation.

THE ABSOLUTE IMPUTATION OF KNOWLEDGE (Pet. 19)

Petitioner did not, as stated in the various briefs, argue that the Court held that lack of due diligence invariably involved owner's privity and knowledge. What petitioner did say was that the effect of this decision is that "any lack of due diligence with respect to the structural seaworthiness of the vessel prior to commencing its voyage is necessarily and absolutely imputed to management. In other words, the Court held as a matter of law that the duty to exercise due diligence to make the ship structurally seaworthy is non-delegable not

only under the Carriage of Goods by Sea Act, but also under the Limitation of Liability Act." (Pet. p. 20). And that is exactly what the Court did.

To aid itself in accomplishing this result, the Court adopted as law the singularly novel statements of Gilmore and Black that the "concept of liability" is the same under the Limitation Act as under the Harter Act and the Carriage of Goods by Sea Act, and that while a shipowner will not be denied limitation for negligent acts of his servants committed "once the ship has broken ground," he will be denied it for acts committed by his shore personnel because he did not exercise control over them while he had the chance. The Court, in a footnote, even went so far as to quote, apparently with approval, a statement from Gilmore and Black that "The corporate owner, unlike the individual owner, will not be allowed to escape liability for breach of his basic duty (to furnish a seaworthy ship) by delegating either to a master or to subordinate shore officials." (Pet. Appendix E, 39a).[3]

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[3] The Court also cites The Linseed King, 285 U.S. 502, which did not involve seaworthiness, but rather the act of a superintendent, right on the spot, sending a launch out in an ice-clogged river. The Court, however, should have been mindful of the following from its favorite authors, Gilmore and Black:

> "The more restricted the operation in which a vessel is engaged, the greater will be the degree of control which the corporate owner will be required to exercise over master, crew and subordinate shoreside employees. The loading cases just discussed suggest that in the case of a farflung extensive enterprise, the corporate owner will preserve his right to invoke both Limitation Act and Fire Statute unless the negligence is brought home at a relatively high executive level." P. 704.

Of course this is not the law at all, as pointed out in the Petition for Certiorari, pages 28-9.

But acting on this false concept, the Court imputed to Vallet a knowledge of the vessel's alleged crack-sensitivity, which he did not have, and which neither the United States Coast Guard, the American Bureau of Shipping, nor Lloyds, nor the United States Salvage Association, nor the Secretary of the Navy's Board of Investigation (Ex. 185), nor anybody else had. The Court attributed to him a knowledge superior to all of them. And even went so far as to say he *knew* of the vessel's alleged crack-sensitivity.[4] As to which there was not a syllable of evidence.

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[4] Since all welded ships are notch-sensitive (crack-sensitive) as has been explained, the Court here means *unusual* or *undue* crack-sensitivity, so as to make the ship unseaworthy—as to which there was no evidence, and certainly none that anybody knew about. As before pointed out, all welded vessels are notch-sensitive (crack-sensitive). Given a notch and sufficient stress, they will crack at the notch. The PENNSYLVANIA's steel was better than that required when she was built. All vessels like her were notch-sensitive at temperatures ranging from 30° to 70°. (R. 1859, 1867, 1868.) There was no testimony that she was *unduly* notch-sensitive as the Court seems to hold. The 22-foot crack on Voyage 5 was no evidence of notch-sensitivity (Testimony of D. P. Brown, Senior Vice-President of American Bureau of Shipping, R. 2743, quoted in Note, p. 30 of the Petition). The Secretary of the Navy's Board of Investigation said that such a crack was "not significant." In other words, meant nothing, was not a warning of anything. The 22-foot crack was fully accounted for by an incipient notch, a heavy stress concentrated at that point by a large deckload of lumber, combined with heavy seas. And the only reason it was classed as a Number I Casualty was that it started so far inboard from the gunwale that it was able to progress more than ten feet before it was stopped by the crack-arrester.

Further, in its effort to uphold its interpretation of Finding VI at all costs, and to avoid a reconciliation of the two findings, the Appellate Court entirely ignored the distinction between negligence and privity and knowledge pointed out on pages 22-25 of the Petition.

CONFLICT BETWEEN THE CIRCUITS

The respondents' briefs attempt to explain away the plain conflict between the decision below and that of the Court of Appeals for the Second Circuit in *Peter Paul, Inc. v. Rederi A/B Pulp*, 258 F.2d 901 by referring to certain allegedly distinguishing facts, while ignoring the common facts which led to the two different decisions.

The critical facts in the two cases are almost identical. Both ships cracked, at a notch, because of "notch-sensitivity." Both had been inspected by equally recognized expert agencies, the Christer Salen by Lloyds; the PENNSYLVANIA by the American Bureau of Shipping and the United States Coast Guard. In the Christer Salen, the Second Circuit exonerated the shipowner. In the PENNSYLVANIA the Ninth Circuit denied both exoneration and limitation. The facts and the evidence were identical. The inspections were not impugned for fraud, collusion, incompetence or otherwise, and were uncontradicted.

The weight to be accorded these inspections involves burden of proof, and is a matter of substantive law. The "burden of proof is a matter of substance." *New Orleans v. Harris*, 247 U.S. 367, 372. Since the

"burden of proof is a matter of substance," the effect of these uncontradicted inspections becomes a matter of substantive admiralty law, and when one Circuit allows it and another denies it, a direct conflict is presented.

CONCLUSION

For the reasons set forth herein, as well as those presented in the petition for a Writ of Certiorari, this Court should grant the writ and resolve the important and contradictory rulings of the Court below.

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No. 314

In the Supreme Court of the United States

OCTOBER TERM, 1958

STATES STEAMSHIP COMPANY, a corporation,
PETITIONER

v.

UNITED STATES OF AMERICA, ATLANTIC MUTUAL INSURANCE COMPANY, PACIFIC NATIONAL FIRE INSURANCE COMPANY, and THE DOMINION OF CANADA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 514

STATES STEAMSHIP COMPANY, a corporation, PETITIONER

v.

UNITED STATES OF AMERICA, ATLANTIC MUTUAL INSURANCE COMPANY, PACIFIC NATIONAL FIRE INSURANCE COMPANY, and THE DOMINION OF CANADA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the United States District Court for the District of Oregon (Pet. App. 1a-2a) was not reported. The three opinions of the Court of Appeals for the Ninth Circuit (Pet. App. 9a-45a) are reported at 259 F. 2d 458, 463, and 470.

JURISDICTION

The original judgment of the Court of Appeals was entered on May 31, 1957. A second judgment,

modifying the first judgment, was entered on November 15, 1957. A petition for rehearing on the second judgment was denied on August 20, 1958. The petition for certiorari was filed on November 13, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court below correctly held that, in the circumstances of this case, petitioner was not entitled to limit its liability for damage resulting from the loss of its vessel due to unseaworthiness.

STATUTES INVOLVED

The relevant provisions of the Limitation of Liability Act (46 U.S.C. 183(a)) and the Carriage of Goods by Sea Act (46 U.S.C. 1303, 1304) are set forth in the Appendix, *infra*, pp. 19-20.

STATEMENT

Petitioner was the owner of the vessel S. S. PENNSYLVANIA, which was lost with all hands in the Gulf of Alaska on January 9, 1952, while en route to the Orient. Petitioner instituted this action by filing a petition for exoneration from, or limitation of, liability in the United States District Court for the District of Oregon (R. 3-9). Respondents, owners of cargo which sank with the ship, answered, objecting to the petition, and submitted claims for full damages. (*e.g.* R. 11-16, 17-24).[1]

[1] The death claims arising out of this action were settled out of court (Pet. App. 3a).

1. *Proceedings in the District Court.*

After a lengthy trial, the district court ruled (Pet. App. 6a, 7a) that petitioner was not entitled to exoneration from liability under the Carriage of Goods by Sea Act, 46 U.S.C. § 1303, 1304 (App. 19-20) because it had failed, in the words of that Act, "to exercise due diligence to make the ship seaworthy". The district court ruled, however, that the unseaworthiness of the vessel was "without the knowledge or privity" of petitioner, and that, under the Limitation of Liability Act, 46 U.S.C. § 183 (App. 19), petitioner's liability should be limited to the value of its interest in the PENNSYLVANIA and her freight, here of no value (Pet. App. 10a).

The district court found that the storm in which the S.S. PENNSYLVANIA sank "was not of such magnitude as to constitute a peril of the sea, the weather encountered * * * certainly was of a kind reasonably to have been expected in January on trans-Pacific voyages over the Great Circle route, and there was nothing catastrophic about the storm, as all other vessels in the area withstood the wind and the seas, the sole and proximate cause of the sinking of the PENNSYLVANIA being her own unseaworthiness." (Pet. App. 4a-5a). The district court further found that the factors which caused the sinking of the S.S. PENNSYLVANIA, as shown in the radiograms sent from the vessel immediately before she sank (Pet. App. 5a),[2] were as follows: (1) Water entered the

[2] These radiograms were introduced into the record as Exhibits 127 and 128.

engine room through a 14-foot crack which the vessel sustained down her port side; (2) The steering systems of the vessel broke down, and for a time the vessel could not be steered by any method; (3) The vessel was taking water in the No. 1 hold, the deck cargo on the forward deck had gone adrift, and the No. 2 hatch was open and full of water (Pet. App. 5a).

The district court found that these "faults, failures, breakdowns, and defects" were "factors of unseaworthiness culminating from the unseaworthy condition of the vessel at the inception of her voyage which prevented her from meeting the expected and to be anticipated weather conditions and proximately caused her sinking * * *." (Pet. App. 5a-6a). The court found that the evidence was insufficient to show that the petitioner used "the due diligence required by law to make the vessel seaworthy and to entitle it to exoneration from liability" (Pet. App. 6a). However, the court also found that "the unseaworthy condition of the vessel at the inception of her voyage was not with the privity and knowledge of the petitioner." (Pet. App. 6a).

The evidence which pointed to petitioner's responsibility for these factors of unseaworthiness may be summarized as follows: The S.S. PENNSYLVANIA was built for the United States Government in 1944 (R. 74). In 1951, the Government sold the vessel to petitioner without warranty. While owned by the Government, the vessel had undergone numerous incidents of hull damage, some of them severe and extensive (R. 2391-2430, 2439-2585). While owned by

petitioner, she made five voyages from the United States to the Orient and back, before her last and fatal voyage. On her fifth voyage, she suffered a 22-foot crack in her main deck (R. 161), designated a Class I casualty. (R. 1864-1865).[2] This crack occurred during rough weather with an air temperature of 54 (Ex. 44), which is a high temperature for a fracture to occur (R. 2773).

On suggestion from petitioner, the Captain turned back to Portland, Oregon (R. 111-112), where petitioner's head office for operations is located (R. 292). Mr. Lester Vallet, petitioner's Marine Superintendent and Port Engineer, boarded the vessel, surveyed the damage and made specifications for the repairs (R. 163). This crack began in a pad eye (R. 1859)[4] but Vallet did not inspect or otherwise test the vessel's pad eyes other than those in the immediate area of the crack (R. 167), despite the fact that the vessel had a history of cracking around pad eyes (R. 617, 638). Vallet had also read (R. 209) the 1946 report of the Ship Structure Committee (*supra*, fn. 3) to the effect that a crack in a vessel is an indication that it is crack sensitive,[5] and that a crack-sensitive

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[2] The final report of a Board of Investigation convened by order of the Secretary of the Navy to inquire into the design and construction of welded steel merchant vessels, dated July 15, 1946 (exhibit 185) defined a Class I casualty as "a fracture which has weakened the main hull structure so that the vessel is lost or is in a dangerous condition" (R. 1864-1865).

[4] A padeye is a loop usually welded down to a ship's deck for fastening cargo gear (R. 166).

[5] Petitioner (Pet., footnote 9) asserts that the Navy Board of Investigation "repudiated" the Board's statistical analysis

vessel is more apt to crack in cold weather than in warm (Exhibit 185).

While the vessel was undergoing these repairs, a crew member discovered that the emergency steering gear was not working (R. 344). Upon investigation, Vallet discovered that cargo in one of the holds, Army blankets and clothing, had become wrapped around the steering shaft, making it difficult to turn. The blankets and clothing were removed (R. 169 and 217), but nothing was done to prevent a recurrence of this condition (R. 372), though the No. 1 hold was loaded full of cargo on the fatal sixth voyage. There is no evidence that any comprehensive tests of the entire steering apparatus were taken at any time.

The vessel then continued the fifth voyage, during which another crack was discovered in the ship's structure (R. 2663). There is no evidence that this crack was ever repaired.

Upon completion of that voyage, the vessel went into drydock in Seattle. Mr. Vallet did not go to Seattle for the drydocking, (R. 178), but sent the Assistant Port Engineer, Mr. Brenneke (R. 331), who was fully empowered to take Mr. Vallet's place and perform his duties in Mr. Vallet's absence (R.

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on the recurrence of cracks. However, no one has repudiated the Committee's finding that there is such a thing as crack sensitivity. It would follow as a matter of common sense that the owner of a vessel which has suffered a serious fracture in warm weather is put on notice that his vessel may well be crack sensitive. In any event, the district court must have rejected this assertion by petitioner when it found petitioner to be negligent.

241, 2623-2624). Mr. Brenneke examined only the underwater portions of the vessel (R. 1718 and 1719), though he was instructed by Mr. Vallet to make a thorough examination (R. 271 and 272). Neither the representatives of the Coast Guard or of the American Bureau of Shipping, inspecting during the drydocking, received any information of anything unusual about the vessel, including the 22-foot crack on her last voyage. (R. 685, 769). They did not inspect the pad eyes and below decks for cracks, and there was no evidence that they inspected the steering apparatus (R. 652-695, 649-771).

The vessel came off the drydock December 22, 1951, and was loaded for her sixth and last voyage. Part of her deck cargo was corrosive acid, to be shipped for the Army (R. 2705, 2775). The Army specified that the acid was to be stowed in the wings of hatches Nos. 4 and 5 on the after deck (R. 2118, 2120, 2121 and 2128). The master, however, intervened during loading and ordered that the corrosive acid be stowed alongside the No. 2 hatch on the forward deck (R. 2687) where the acid cargo would be subject to a more severe battering in heavy weather (R. 2433, 2434, 2220 and 2705). The acid cargo was stored two tiers high (instead of one high as requested by the Army) (R. 1004) and lashed to pad eyes (R. 1040-1041, 1081). Petitioner was informed that the vessel had been loaded in this fashion (R. 1166 and 1167). It was petitioner's regular practice to approve the stowage arrangement before advising the master that he may leave (R. 284).

In spite of the knowledge by Vallet and Brenneke,

petitioner's marine superintendents, that the vessel may have had a defective steering gear, that in all likelihood it was crack sensitive, that it had been improperly stowed, and that it never had been thoroughly inspected, petitioner permitted the ship to leave on its last voyage to the Orient on January 5, 1952, without even instructing the master to take a warm water route.

2. *The proceedings on appeal.*

Petitioner appealed from the district court's ruling that it was not entitled to exoneration from liability, and respondents appealed from the ruling limiting petitioner's liability. The Court of Appeals for the Ninth Circuit, in an opinion filed May 31, 1957, affirmed the decision of the district court. Both sides petitioned for rehearing, and on November 15, 1957, the Court of Appeals filed its unanimous opinion denying the petitioner's request for rehearing, but modifying its original opinion by holding, on "further study of the record" (Pet. App. 20a), that the district court erred in limiting petitioner's liability. Petitioner applied for a rehearing. On August 20, 1958, the Court of Appeals denied petitioner's request and filed another unanimous opinion, which clarified its opinion of May 31, 1957.

The Court of Appeals held that the finding that petitioner did not exercise due diligence, upon which the district court's denial of exoneration was based, was abundantly supported by the evidence (Pet. App. 17a). However, the court below disagreed with the

view that petitioner did not have privity or knowledge, holding that "the only person whose negligence could have operated to bring about the unseaworthy condition, the only persons to whom the lack of due diligence could possibly be charged, where persons who were managing officers of the corporation. The court not only did not find that the failure to exercise due diligence was that of minor or subordinate employees, but the court could not have made such a finding" (Pet. App. 23a).

ARGUMENT

The holding of the Court of Appeals turns on the particular facts, presents no conflict of decisions requiring resolution by this Court, and involves the determination of a question of no general importance.[6] In view of the narrow implications of the rulings below, there is no need for further review.

1. (a) Petitioner (Pet. 15-19) contends that the Court of Appeals misapprehended the appellate review standards set down in *McAllister* v. *United States*, 348 U. S. 19, 20. In that case this Court held "In reviewing a judgment of a trial court, sitting without a jury in admiralty, the Court of Appeals may not set aside the judgment below unless it is

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[6] On the basic issue, namely, that the vessel was lost not by reason of a peril of the sea but as the result of unseaworthiness attributable to lack of due diligence, the two-court rule applies. *Comstock* v. *Group of Investors*, 335 U. S. 211, 214.

clearly erroneous. * * * A finding is clearly erroneous when, 'although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed,' [citing cases]." The Court of Appeals applied that standard here, and we believe, was amply justified in concluding that the finding of petitioner's lack of privity or knowledge was clearly erroneous.

The trial court found that it was petitioner's lack of due diligence which caused the unseaworthiness of the S.S. PENNSYLVANIA. Yet all the evidence supporting this finding pointed to the lack of due diligence of Vallet and Brenneke, petitioner's managerial employees, and thus to the negligence of petitioner itself. To be sure, there was evidence in the case which might have supported a finding that Vallet and Brenneke were not negligent. But once this evidence was rejected in favor of a finding that they were negligent, (*i.e.*, that they had not used the due diligence necessary for petitioner's exoneration from liability under 46 U.S.C. § 183(a)) it necessarily followed, as the court below held, that they, and therefore petitioner, had "privity or knowledge" of the unseaworthiness of the vessel. There is no evidence to support petitioner's speculative hypothesis that "Such negligence may have related to something other than failure to correct the vessel's crack-sensitivity. It may have involved merely the neglect of a non-managerial employee to lash the deck cargo properly or to check the steering mechanism" (Pet. p. 16).

(b) The Court of Appeals, after an extensive study of the record in this case, became convinced 'that States Steamship Company failed to sustain its burden of proof to warrant a limitation of liability. [The record] clearly shows that the unseaworthiness which the court found to be the cause of the loss, and due to the owner's lack of due diligence, was with the privity and knowledge of its managerial employees." (Pet. App. 20a). A reading of the opinions below shows clearly that the decision by the Court of Appeals does not, as petitioner asserts (Pet. pp. 19-25), involve an "equation" of the concepts of negligence and knowledge, or any "absolute imputation" of knowledge, as a rule of law applicable to other cases.[7] Rather, the Court of Appeals merely "pointed out that *upon this record* such negligence [*i.e.*, the negligence resulting in the unseaworthiness of the S.S. PENNSYLVANIA] was necessarily the negligence of Vallet" (emphasis and explanation supplied) (Pet. App. 42a).

(c) None of the cases cited by petitioner in any way affects the validity of the result reached below. *Coryell* v. *Phipps*, 317 U.S. 406 (cited Pet. p. 21) was a case in which the trial court found that a fire

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[7] Petitioner perhaps has been misled by some language in the court's opinion of November 15, 1957, which, given one interpretation, might be taken to mean that the finding of lack of due diligence on the part of an owner of a vessel is *always* inconsistent with a finding that the owner was without privity or knowledge (Pet. App. 21a, 22a). Petitioner fails to mention that the Court of Appeals in its opinion of August 20, 1958, expressly struck this language from its prior opinion (Pet. App. 45a).

on board the owners' ships was proximately caused by fumes emanating from a leak in the vessel's engine. The leak was caused by the passage of time, rather than faulty installation of the engines. The owner had no clue that this condition existed, and had done all he could to ascertain that the vessel was safe. This Court, in affirming the district and circuit courts, held that under these findings the petitioner had met his burden of proving that he was without "knowledge or privity" of the fault which caused the fire. The Court expressly distinguished those cases in which "it is held that liability may not be limited under the statute where the negligence is that of an executive officer, manager or superintendent whose scope of authority includes supervision over the phase of the business out of which the loss or injury occurred". (317 U.S. at 410). The other cases cited by petitioner (Pet. p. 22) are equally distinguishable on their facts; all are similar to *Coryell* v. *Phipps* in that the owner of the vessel in each of these cases met his burden of proof that neither the owner nor any of its managerial employees were privy to any negligence, or had knowledge of any fault, which caused the accident in question.

The facts of the present case are more closely related to those in *Spencer Kellog & Sons* v. *Hicks*, 285 U.S. 502, cited approvingly in *Coryell* v. *Phipps* (317 U.S. 406, 410). There the corporate owner of a launch known to be unseaworthy in conditions of icy water was denied limitation of liability where it was shown

that its manager in charge had reason to know that the water would be icy on the day of the voyage, but failed to order the master of the vessel not to sail. Also similar is *The Silver Palm*, 94 F. 2d 776, where a collision was caused by ignorance on the part of the master of one of the vessels of an unusual steering gear on his vessel. The owner of the vessel was not permitted to limit its liability, since, by not telling the master about the steering gear, it had privity and knowledge of the fault which caused the collision.

The petition here appears to overlook the important fact that the cases discussed above involved the Limitation Act alone. The owner of the vessel in each of them was not contending that he was entitled to exoneration from liability under the Carriage of Goods by Sea Act, 46 U.S.C. 1303(1)(a). He was attempting to show that he had no "privity or knowledge" of the negligence of a non-managerial employee or other person which caused the accident. Apart from the unfounded speculation noted, p. 10, *supra*, petitioner does not seriously attempt to make such a case here, and, as the Court of Appeals held (see p. 9, *supra*), it cannot be made on the evidence of record.

2. The petition also cites (Pet. p. 21) *Earle & Stoddardt* v. *Ellerman's Wilson Line*, 287 U.S. 420, on the issue of "non-delegable duty". Petitioner also quotes (Pet. p. 20), with disapproval, a discussion in a treatise[8] on the question of "non-delegable du-

[8] Gilmore and Black, *The Law of Admiralty* (1957).

These references are irrelevant here, for there o issue of "non-delegable duty". The petition s no claim, nor could it, that Vallet or Brenneke ated any managerial duty to a non-managerial oyee, or that the knowledge of the vessel's unsea- hiness, upon which the finding of negligence was l, was the knowledge of anyone other than Vallet renneke.

titioner suggests, apparently under a theory of gation" (Pet. p. 20, 21), that Vallet, who had vledge that the vessel was unseaworthy, should ntitled to rely on the reports of the Coast Guard the American Bureau of Shipping and thus ld be absolved from his duty not to allow the el to be put to sea in a condition known by him unseaworthy. This contention is insubstantial, ially in view of the fact that the inspection by representatives of the Coast Guard and the ican Bureau of Shipping was not complete, and t did not tell the representatives what he knew t the vessel's unseaworthiness. The court below ved (Pet. App. 31a, 32a):

The record warranted the court's evident conclusion that an inspection of a vessel known to have a history of crack sensitiveness and particularly a history of a Class 1 fracture, should be much more careful and elaborate than this vessel ever had. The company itself was chargeable with knowledge of the pending inspection and yet it failed through Vallet or Brenneke or any other person to inform the inspectors of these special conditions attending the ship. In the words used in

> the *Silver Palm, supra*, all these circumstances "made the more imperative the obligation of the owner and operator to advise" of the special circumstances calling for a special inspection and a more thorough one than had been given.

This language by the court below shows that the recent decision of the Court of Appeals for the Second Circuit in *Peter Paul, Inc.* v. *Rederi A/B Pulp*, 258 F. 2d 901, is not in conflict with the decision below, as petitioner asserts (Pet. p. 25-26). In the *Peter Paul* case, a vessel owner petitioned for exoneration from liability after its ship cracked in two and the forward part sank. There was no evidence that the vessel was crack sensitive or that the owner had reason to know that it was crack sensitive. The Court of Appeals for the Second Circuit stated that "[t]he Christer Salen had been roving the seven seas for years without displaying the slightest indication of her latent unseaworthiness; the operation of her eight sisterships likewise furnished no clues of any inherent danger." These circumstances, coupled with the fact that a Lloyd's ship surveyor had inspected the hull of the ship and pronounced it in good condition, supported a holding by the district court that the owner was not obliged, under his duty to use due diligence to make the ship seaworthy before it went to sea, to install crack arresters. The court expressly distinguished the instant case, 258 F. 2d at 905:

> The recent case of *States Steamship Co.* v. *United States*, 9 Cir., —— F. 2d ——, is distinguishable for similar reasons. In that case

the S.S. Pennsylvania sunk with all hands, apparently because of a major fracture. The twenty-two foot crack in her deck which occurred on the voyage immediately preceeding the disaster should have put the owner on notice that he had an unseaworthy vessel.

3. Finally, this case has no importance beyond its particular and special facts. The articles from marine journals (Pet. p. 31) and the remarks of the General Counsel for the United States Maritime Commission (Pet. p. 32), were prepared before the third opinion of the court below was filed on August 20, 1958. The following excerpts from that opinion make clear the narrowness of the court's holding:

> The Steamship Company argues that in drawing our conclusions we have set forth a broad rule that in any case where the Steamship Company fails to use due diligence to make the vessel seaworthy at the inception of her voyage, limitation must be denied. We did not so hold.
>
> * * * *
>
> It is * * * apparent that the district court found there was negligence. After noting that the finding was abundantly supported by evidence, *we have by our decision pointed out that upon this record such negligence was necessarily the negligence of Vallet.* Accordingly we hold limitation of liability must be denied.
>
> * * * *
>
> Petitioners make reference to the portions of the evidence in the record which they say tends to show that the steel of the Pennsylvania was no different from the steel of all welded ships

built at the same time. Reference is made to technical reports and to testimony of witnesses who surveyed and inspected the ship or samples of her steel tending to show that there was no lack of due diligence in making the ship seaworthy. There is no question but that the record contains a substantial amount of evidence to that effect. *The difficulty is that the trial court rejected it in the findings which we have quoted above.* When the court found that the proximate cause of the sinking was the Pennsylvania's unseaworthiness; that the crack sensitiveness by reason of her former 22 foot crack in her deck was a factor of unseaworthiness culminating from her unseaworthy condition at the inception of her voyage and that there was a lack of due diligence to make the vessel seaworthy, it rejected the contrary evidence now cited to us in the Steamship Company's petition for rehearing.

It is suggested that there is something in our opinion to the effect that all welded steel vessels are unseaworthy. As authority for this assertion petitioner quotes from a television broadcast in which the broadcaster purports to construe the meaning of our decision. The broadcaster is mistaken; *we did not so hold.*

The petition contains a table taken from one of the exhibits in the case showing the number of fractures and casualties in some 4694 ships built by the Maritime Commission. This table shows a substantial number of fractures and casualties. On the basis of this, petitioner asserts that in respect to the likelihood of cracks and fractures, the Pennsylvania was exactly like all other welded steel ships and is no dif-

ferent from the bulk of dry cargo tonnage in the American Merchant Marine.

But the 127 cases of serious casualties listed in this table do not contain any Victory class vessels such as the Pennylvania [sic.] *The Pennsylvania was unique in its prior Class I hull fracture on Voyage V.* The testimony showed that there had been over 2000 shipping years of experience with Victory ships and there was no history of a Class I casualty on such a ship. The failure of due diligence found by the court was in sending a ship *known* to be crack sensitive upon that voyage.

The suggestion that our decision puts all welded ships out of business over the northern route is wholly unwarranted. [Emphasis supplied; Pet. App. 38a, 41a-42a, 44a, 45a].[9]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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DECEMBER 1958.

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[9] The third opinion by the court below also shows clearly that the arguments on the merits urged in the motion by other steamship companies for leave to file an *amicus curiae* brief, have no application to this case.

APPENDIX

1. The Limitation of Liability Act, 46 U.S.C. 183 (a), provides as follows:

> § 183. *Amount of liability; loss of life or bodily injury; privity imputed to owner; "seagoing vessel."*
>
> (a) The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

2. The Carriage of Goods by Sea Act, 46 U.S.C. 1303 (1)(a), 1304 (1), 1304 (3), provides as follows:

> § 1303. *Responsibilities and liabilities of carrier and ship—(1) Seaworthiness.*
>
> The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to—
>
> (a) Make the ship seaworthy;
>
> * * * * *
>
> § 1304. *Rights and immunities of carrier and ship —(1) Unseaworthiness.*

Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped, and supplied, and to make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried fit and safe for their reception, carriage, and preservation in accordance with the provisions of paragraph (1) of section 1303 of this title. Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other persons claiming exemption under this section.

* * * *

(3) *Freedom from negligence.*

The shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault, or neglect of the shipper, his agents, or his servants.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 514

STATES STEAMSHIP COMPANY,

Petitioner.

—versus—

UNITED STATES OF AMERICA, ATLANTIC MUTUAL INSURANCE CO., PACIFIC NATIONAL FIRE INSURANCE CO., and THE DOMINION OF CANADA,

Respondents.

BRIEF OF ATLANTIC MUTUAL INSURANCE CO. AND PACIFIC NATIONAL FIRE INSURANCE CO. IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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While this case is of obvious importance to the parties it is of no importance to anyone else. The only principles of law which the case presents are well established in all the circuits which deal with Admiralty causes.

A

The loss of the S.S. "Pennsylvania" did not result from a sea peril but from her own unseaworthiness existing by reason of petitioner's lack of due diligence

The petitioner urges in its petition (at p. 6) that a storm of great violence caused the loss of the

nsylvania." However, the District Court (Appendix B, Findings III to VI, 5a-6a)* and the Court of Appeals (Appendix C, 12a-15a, 17a) found concurrently that her loss did not result from a sea peril but from her unseaworthiness which existed through lack of due diligence.

The District Judge, resident in Arizona, was sitting temporarily in the District of Oregon. In his memorandum opinion he said, as quoted at page 10 of the petition, "Those charged with her inspection owed the care of reasonable and prudent persons * * *." Also, he commented in that memorandum (Appendix C, 14a) that the defect in the ship which caused her loss may have been "latent". This, also, is emphasized in the petition (at p. 10). However, the memorandum was loosely worded and in the District Court's formal findings it was set out (Appendix B, Finding VI, 6a) that the petitioner had not established that it had exercised due diligence in relation to the unseaworthiness which caused the loss of the vessel and for that reason the Court concluded (Conclusion 1) that the petitioner was not entitled to exoneration from liability. No suggestion of a latent defect appears in the Findings. In the Ninth Circuit the formal findings are controlling rather than a prior informal memorandum. *Oaksmith* v. *Garner*, 205 F. (2d) 262 at pp. 266-7. That is also the rule in other circuits.

In setting out the provisions of the Carriage of Goods by Sea Act—at page 4 of the petition—unfortunately there is omitted the important provision

* References in this brief to Appendices are to those attached to petition.

appearing at the end of 46 U. S. C. par. 1304 (1): "Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other persons claiming exemption under this section.")

In all three of its opinions the Court of Appeals found that there was ample evidence supporting the finding of the District Court that the unseaworthiness of the "Pennsylvania" which caused her loss resulted from lack of due diligence (1st Opinion, Appendix C, 17a; 2d Opinion, Appendix D, 20a, 33a; 3d Opinion, Appendix E, 37a, 41a).

B

The petitioner is not entitled to limitation of its liability

So far as concerns limitation of liability, the law is clear, as the Court of Appeals held (Appendix, E, 42a), that the vessel owner seeking limitation must prove its lack of privity with or knowledge of the cause of the disaster which has established its liability. *Coryell* v. *Phipps*, 317 U. S. 406 at p. 409.

Finding in general terms that lack of due diligence required the conclusion that the petitioner was liable for the loss of the cargo of the "Pennsylvania," the District Court made no finding as to which of the petitioner's representatives was negligent. It found also in general terms (Appendix B, Finding VII, 6a) that "the unseaworthy condition of the vessel at the inception of her voyage was without the privity or knowledge of petitioner * * *."

The Court of Appeals found in its second and third opinions that the petitioner's representatives who were in privity with sending the "Pennsylvania" to sea in an unseaworthy condition, were its managing officers and that their privity necessarily defeated the petitioner's right to limitation of liability (Appendix D, 23a, 25a-26a; Appendix E, 41a-42a).

The Court of Appeals did not disregard the decision of this Court in *McAllister v. The United States*, 348 U. S. 19, as argued by the petitioner (at pp. 15-19). The Court cited that case (Appendix D, 26a), recognized its principle and applied it. In its second and third opinions the Court of Appeals corrected the erroneous conclusion set out in its first opinion, so far as concerns limitation of liability. It determined unanimously that correction was required because it became convinced that its prior conclusion and that of the District Court were clearly erroneous so far as concerns limitation of liability (Appendix D, 20a, 23a-34a; Appendix E, 38a-42a).

The Court of Appeals did not hold (as is argued by petitioner at pages 19 et seq.) that lack of due diligence invariably involves a vessel owner's privity and knowledge. It specifically held to the contrary (Appendix E, 38a). Here petitioner's managing officers were in privity with sending an unseaworthy vessel to sea. Not only was there no evidence establishing their ignorance of the unseaworthiness but there was positive evidence that they were familiar with the vessel's condition.

The case presents no issue of delegation of responsibility as argued in the petition (at pp. 20-21). Here

the responsibility was not delegated: it was negligently borne by petitioner's managing officers. It is true (as argued at pp. 20-24) that negligence of a vessel owner's inferior servants may establish its liability without defeating its right to limitation but that principle has no application here.

The discussion at pages 25-29 of the petition is not of any legal principle: it is primarily an argument that the courts below were in error in their concurrent findings that the "Pennsylvania" was unseaworthy through lack of due diligence.

C

The case presents no conflict between circuits concerning any legal principle nor any issue of public interest

We find strange indeed the argument (at p. 27) that this Court should review this case because the owner of another welded vessel—the "Christer Salen"—was held exempt from liability in another circuit on different evidence. That vessel fractured under entirely different circumstances. There the decision of the Court of Appeals, as in the instant case, was based upon findings of fact of the District Court. In any event the petitioner misconceives, we think, the basis for the granting of petitions for certiorari because of a conflict between circuits. When there is such a conflict we understand that this Court may decide to grant a petition if a legal principle involved in the conflict is of substantial importance. Here the argument is that in *Peter Paul, Inc.* v. *Rederi A B*

Pulp, 258 F. (2d) 901, the Court of Appeals for the Second Circuit gave more weight to an inspection certificate than did the Court of Appeals in the instant case.

We find ourselves unable to perceive the competency or the relevancy of the assertions (set out at pp. 31-32 of the petition) that there has been critical discussion of the decision in the instant case in various non-legal publications which are said to be "leading journals" but with which we are not familiar; nor of the asserted off-hand comments of a lawyer interested in the adoption of a proposed international convention. As the record of the case presents no issue which is of importance except to the parties, it is apparent that this extraneous unproven matter is added in an effort to establish a public interest in the hope that this may in some way be helpful in securing a review by this Court.

Respectfully submitted,

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A.

INTRODUCTORY STATEMENT

The DOMINION OF CANADA, as a cargo claimant and a respondent herein, has not consented to the filing of an *amici curiae* brief by steamship companies that are identified as members of Pacific American Steamship Association because this case does not concern such vessel owners and involves only the question of liability of the petitioner herein to respondents for loss of cargo resulting from the sinking of the SS *Pennsylvania*.

This is made crystal clear by the last opinion by the Court of Appeals for the Ninth Circuit wherein it is stated:

> "It is suggested that there is something in our opinion to the effect that all welded steel vessels are unseaworthy . . . . we did not so hold. . . . The suggestion that our decision puts all welded ships out of business over the northern route is wholly unwarranted." (August 20, 1958 opinion of CA 9, 259 F.2d 458, 475; see also at Appendix E at p. 44a-45a)*

The DOMINION OF CANADA as a cargo claimant and a respondent adopts and concurs with all of the statements and authorities set forth or cited in the brief

*References in this brief to Appendices relate to those in the Petition for Writ of Certiorari.

of ATLANTIC MUTUAL INSURANCE CO. and PACIFIC NATIONAL FIRE INSURANCE CO. in opposition to the Petition for Writ of Certiorari filed herein by STATES STEAMSHIP COMPANY. In addition, THE DOMINION OF CANADA submits the following:

B.

REASONS WHY PETITION SHOULD NOT BE GRANTED

1. The latest decisions of the Court of Appeals for the Ninth Circuit are not in conflict with the decisions of any other Court of Appeals.*

Petitioner urges (p. 25) that the final ruling below is in conflict with the Court of Appeals for the Second Circuit in *Peter Paul, Inc. v. Rederi A B Pulp*, 258 F.2d 901, a case involving the breaking in two of a Swedish built vessel, the *Christer Salen*. The court's opinion in this later case in the Second Circuit considered the Ninth Circuit decisions in the present case and then stated:

> "The recent case of *States Steamship Co. v. United States*, 9 Cir. . . . F.2d . . . , is distinguishable . . . ."

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*Both the Nov. 15, 1957 opinion and the August 20, 1958 opinion of the Court of Appeals for the Ninth Circuit are conveniently printed together at 259 F.2d 458, 463, 470.

The decision of the Second Circuit in *Peter Paul, Inc. v. Rederi A/B Pulp, supra,* went on to point out factual differences as to the type of vessel and past history and circumstances of the loss which, as to the present case of the *Pennsylvania*, "should have put the owner on notice that he had an unseaworthy vessel."

2. The latest decisions of the Court of Appeals for the Ninth Circuit are not in conflict with decisions of this Court.

Contrary to petitioner's contentions (p. 14), the latest decisions of the Court of Appeals for the Ninth Circuit did not disregard the standard of appellate review set out by this Court in *McAllister v. United States*, 348 U.S. 19. In fact, the court below expressly referred to and adhered to these standards in its decision of November 15, 1957 on Petition for Rehearing. (Appendix E at page 26a; see also at 259 F.2d 458, 466). In doing so the Court of Appeals merely corrected its "conclusion" concerning limitation of liability that was inconsistent with and not supported by the trial court's findings of fact as to lack of due diligence by managerial employees of petitioner. (Appendix D at page 22a)

3. The Court of Appeals has not decided any new question of federal law which has not been previously passed upon by this Court.

The latest decisions below both cited and followed

the decision of this Court in *Spencer-Kellogg Co. v. Hicks*, 285 U.S. 502 on the question of denial of limitation of liability where managerial employees of the shipowner failed to use due diligence to ascertain whether the *Pennsylvania* was seaworthy before departure on the voyage. (Appendix D at page 29a and Appendix E at page 39a). Finding V of the trial court established this fact.

Petitioner urges (at page 20) that the decision below on lack of due diligence would *invariably* involve the shipowner's privity and knowledge, contrary to the language of the Limitation of Liability Act, Title 46 U.S. Code § 183(a). The Court of Appeals for the Ninth Circuit pointed out in its last opinion that "We did not so hold." (Appendix E at page 38a). The decision goes on to point out that it was the negligence of *managerial* personnel who had knowledge of the unseaworthy condition of the vessel by reason of serious deck cracks on the last voyage that formed the primary basis for denial of limitation in the present case. Throughout the opinions the Court of Appeals for the Ninth Circuit stressed the fact that this neglect was not of "minor or subordinate employees," but of "managerial employees" of petitioner.

4. This case is not of extraordinary, or even of special, importance to the steamship industry.

The labored and abortive effort by petitioner and

movants for *amici curiae* status to make this case one of special importance and of public interest is demonstrated by their reliance upon a television reporter's analysis (Appendix E at page 44a); reference to editorial comments on the case in two unknown trade journals (Petitioners Brief page 31); and by movants expressed concern whether all "war built vessels" with "fracture experience" must be taken out of service "in the wintertime" because of the decision of the court below. (Motion for Leave to File as Amici Curiae at page 2). The comments and quotations from the latest decision by the Court of Appeals for the Ninth Circuit in our INTRODUCTORY STATEMENT adequately cover these rather extravagant and unfounded contentions.

C.

CONCLUSION

A reading and rereading of the latest decisions of the court below clearly establishes that all of the questions raised by petitioner and by movants have been fully considered, weighed and properly decided and answered by the Court of Appeals for the Ninth Circuit in accordance with established principles of Maritime law applicable to this case. There is therefore no reason why this court should review any issue in this cause.

Respectfully submitted.

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Office Supreme Court, U.S.
DEC
Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 514

STATES STEAMSHIP COMPANY,

Petitioner,

—VERSUS—

UNITED STATES OF AMERICA, ATLANTIC MUTUAL INSURANCE CO., PACIFIC NATIONAL FIRE INSURANCE CO., and THE DOMINION OF CANADA,

Respondents.

OBJECTIONS OF RESPONDENTS, ATLANTIC MUTUAL INS. CO. AND PACIFIC NATIONAL FIRE INS. CO., TO THE MOTION FOR LEAVE TO FILE BRIEF OF VARIOUS STEAMSHIP COMPANIES AS AMICI CURIAE, IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI.

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Insurance Co.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

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OBJECTIONS OF RESPONDENTS, ATLANTIC MUTUAL INS. CO. AND PACIFIC NATIONAL FIRE INS. CO., TO THE MOTION FOR LEAVE TO FILE BRIEF OF VARIOUS STEAMSHIP COMPANIES AS AMICI CURIAE, IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI.

Rule 42 (1) of this Court states that motions for permission to file briefs amici in support of petitions for certiorari "are not favored." Rule 42 (3) provides that parties served with such a motion may file objections "concisely stating the reasons for withholding consent."

We have withheld consent to the filing of a brief on behalf of the movants which, together with petitioner, are members of Pacific American Steamship Association, because in our opinion this case is peculiarly inappropriate for the intervention of amici curiae. This

case is of importance to Pacific American Steamship Association only because one of its members has been held liable for the loss of cargo carried on the S. S. "Pennsylvania."

The movants' argument (at p. 2 of its motion) is in effect an argument that the courts below were in error in their concurrent findings that the evidence establishes that the S. S. "Pennsylvania" was unseaworthy through lack of due diligence. This is an issue of importance only to the parties to the litigation. The Court of Appeals dealt with the argument then advanced by the petitioner and now repeated by the movants, that the decision in effect holds that all welded vessels are unseaworthy for a winter voyage, and said (Appendix E, 45a*):

> "The suggestion that our decision puts all welded ships out of business over the northern route is wholly unwarranted."

The movants' argument (at p. 3) that it should be permitted to intervene because of the asserted failure of the Court of Appeals "to give appropriate recognition to the relationship between a steamship company on the one hand and the U. S. Coast Guard and the American Bureau of Shipping on the other hand," involves no question of general interest: it concerns the weight to be afforded the evidence in this case, which is hardly a question which will interest this Court.

The argument which the movants advance as a reason why they should be permitted to interevene (at p.

* Reference to appendices are to those attached to the petition.

3), that the Court of Appeals failed to "distinguish between the 'due diligence' requirements of the Carriage of Goods by Sea Act and the 'lack of privity or knowledge' requirement of the Limitation of Liability statute;" is without any basis. The Court of Appeals considered that issue and said (Appendix E, 38a):

> "The Steamship Company argues that in drawing our conclusions we have set forth a broad rule that in any case where the Steamship Company fails to use due diligence to make the vessel seaworthy at the inception of the voyage, limitation must be denied. We did not so hold."

What the Court did hold was that the evidence in this case establishes that petitioner's managing officers not only were lacking in due diligence but were in privity with the unseaworthiness which caused the vessel's loss. The "impact of the decision below upon practical steamship operation" of which movants complain (at p. 3), is only the impact of a salutary reassertion of the well recognized principle that a vessel owner is not entitled to limitation of its liability for the loss of cargo (or for loss of life—45 seamen lost their lives in this disaster), when its managing officers are in privity with the unseaworthiness which causes the loss.

Respectfully submitted,

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FILED
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JAMES R. BROWNING, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 514

STATES STEAMSHIP COMPANY, a corporation,

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vs.

UNITED STATES OF AMERICA,
ATLANTIC MUTUAL INSURANCE COMPANY,
PACIFIC NATIONAL FIRE INSURANCE COMPANY,
and THE DOMINION OF CANADA,

Respondents.

Motion for Leave to File Brief as Amici-Curiae in Support of Petition for Certiorari of States Steamship Company

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In the Supreme Court of the United States

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---

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Now come AMERICAN MAIL LINE, AMERICAN PRESIDENT LINES, LTD., GRACE LINE, INC., LUCKENBACH STEAMSHIP COM-

PANY, INC., MATSON NAVIGATION COMPANY, MOORE-McCORMACK LINES, INC., OLIVER J. OLSON & CO., PACIFIC FAR EAST LINE, INC., PANAMA PACIFIC LINE and WEYERHAEUSER STEAMSHIP COMPANY, and respectfully move this Court for leave to file a brief as amici curiae in support of the petition for a writ of certiorari filed by petitioner States Steamship Company on November 13, 1958.

Counsel for States Steamship Company have consented to the filing of such a brief but such consent was refused by counsel for the respondents.

Movants are corporations organized and existing by virtue of the laws of various States of the United States and are common carriers by water in the domestic and foreign commerce of the United States. Together with petitioner, they are members of Pacific American Steamship Association, a trade association composed of most of the steamship lines with operating headquarters on the Pacific Coast; the vessels of which constitute over 90% of all American flag vessels so employed with Pacific Coast headquarters.

Movants are interested in this case because at the present time they are operating a total of over 120 vessels, practically all of which are classified as "war-built vessels", the vast majority of which were purchased from the United States Government following World War II in reliance upon their satisfactory condition. Of these vessels, records indicate that some 8 have suffered Class I fractures at some time during their life. If the decision of the Court of Appeals for the Ninth Circuit herein stands, there will be a serious question as to whether those companies who own ships with fracture experience will be able to operate them in the winter time and the implications are such that there is a serious question as to whether they may be operated *at all*.

Movants are further interested by reason of the failure of the Court below to give proper recognition to the relationship between a steamship company on the one hand and the United States Coast Guard and the American Bureau of Shipping on the other hand.

Finally, movants are interested because of the holding of the Court below which fails to distinguish between the "due diligence" requirements of the Carriage of Goods by Sea Act and the "lack of privity and knowledge" requirements of the Limitation of Liability statute. The decision below makes such inroads upon the protection afforded to a shipowner by the Limitation of Liability statute that it is questionable whether it has any real meaning.

Movants believe that while the petition for a writ of certiorari has been excellently prepared and presents compelling reasons why this Court should grant the writ, nevertheless it is written, and properly so, with particular emphasis upon the specific facts of the case. Movants believe that it is vital to the steamship industry that they, as amici curiae, present to the Court additional material to demonstrate that the impact of the decision below upon practical steamship operation in the domestic and foreign commerce of the United States is such that the case presents considerations of great public and national policy which should be ruled upon by this Court. Some of these considerations are touched upon in the petition for the writ of certiorari but movants believe that a fuller presentation is required.

If this motion is granted, movants will prepare and file a reasonably short brief which will demonstrate to the Court the widespread interest of the shipping industry in the issues presented and the serious impact which the decision below will have when translated into the practicalities of the every-day operation of steamships.

For the foregoing reasons, it is respectfully requested that this motion for leave to file a brief as amici curiae be granted.

Dated: San Francisco, California, November 24, 1958.

Respectfully submitted,

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Of Counsel:

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Certificate of Service by Mail

I am a member of the bar of the Supreme Court of the United States, counsel in this cause, and not a party thereto. On November 24, 1958, I deposited in the mail at San Francisco, California, 8 sealed envelopes with airmail postage thereon fully prepaid, each containing at least one true copy of this Motion, and addressed as follows:

Solicitor General,
Department of Justice,
Washington 25, D. C.

George Cochran Doub,
Assistant Attorney General,
Department of Justice,
Washington 25, D. C.

Leavenworth Colby,
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FEB 3 1958
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

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STATES STEAMSHIP COMPANY, a corporation, *Petitioner,*

v.

UNITED STATES OF AMERICA, ATLANTIC MUTUAL INSURANCE COMPANY, PACIFIC NATIONAL FIRE INSURANCE COMPANY and THE DOMINION OF CANADA, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR REHEARING

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

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UNITED STATES OF AMERICA, ATLANTIC MUTUAL INSURANCE COMPANY, PACIFIC NATIONAL FIRE INSURANCE COMPANY and THE DOMINION OF CANADA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR REHEARING

Petitioner prays that this Court grant rehearing of its order of January 12, 1959, denying the petition for a writ of certiorari, and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Ninth Circuit in the above-entitled case as prayed for in the petition filed on November 13, 1958, herein.

Reasons for Granting Rehearing and Issuing the Writ

On January 2, 1959, subsequent to the filing of the petition in the instant case, a petition for a writ of certiorari was filed in *Peter Paul, Inc.* v. *Rederi A B Pulp*, No. 617, Oct. Term, 1958, seeking review of the judgment of the Court of Appeals for the Second Circuit, 258 F. 2d 901. This Court has not yet acted upon the *Peter Paul* petition.

Because of the pendency of the *Peter Paul* petition it is appropriate for this Court to reconsider its denial of certiorari in the instant proceeding. One factor making review of this case proper was stated in the petition (pp. 25-28) to be the direct conflict between the ruling below and that of the Court of Appeals for the Second Circuit in the *Peter Paul* case. It now appears that the *Peter Paul* petition (pp. 16-17) similarly states that the conflict between the two decisions makes review appropriate in that case.

Therefore, if this Court determines that the *Peter Paul* case should be accepted for review it undoubtedly would want to consider the instant case at the same time. But even if the *Peter Paul* case should not be accepted for review, in the belief that the result reached below was obviously correct, the basic conflict with the instant case would be intensified and would acquire a disturbing quality of permanency. In other words, the *Peter Paul* petition puts into sharp focus the conflict which makes review of the *State's Steamship* case so appropriate and necessary. It highlights the fact that it would be particularly helpful to the development of admiralty law and to the stability of the maritime industry to have a definitive resolution of the problem over

which the Courts of Appeals in these two cases have so sharply divided. That division is best illustrated by a comparative analysis of the two cases:

Peter Paul	*States Steamship*
1. The CHRISTER SALEN, an all-welded steel vessel, had been "roving the seven seas" since 1945. In February, 1951, it suffered a fracture or crack, starting at the top of the starboard sheer strake. The vessel broke in two and the forward half was a total loss.	1. The PENNSYLVANIA, an all-welded steel vessel, had been sailing the seas since 1944. In January, 1952, it suffered a fracture or crack down the portside, starting in the sheer strake. The vessel sank and was a total loss.
2. The vessel was found by the District Court to have been "notch brittle" at the point of origin of the fracture.	2. The vessel was found by the District Court to have been "crack sensitive."
3. Two or three months before the disaster, the CHRISTER SALEN suffered a crack at the top of its portside bulwark. This crack was duly repaired to the satisfaction of all appropriate authorities.	3. Two or three months before the disaster, the PENNSYLVANIA suffered a 22-foot crack in the deck, "which crack was fully repaired" to the satisfaction and approval of the United States Coast Guard, the American Bureau of Shipping, Lloyds of London, the United States Salvage Association and the repair yard. Later, the National Bureau of Standards found the tensile strength of the steel plates better than the original requirements.
4. A month before the disaster, the vessel was drydocked for normal maintenance purposes. It was inspected by Lloyds of London and the shell was found to be in good condition. The vessel was accordingly classified as seaworthy.	4. Two weeks before the disaster the vessel was drydocked for normal maintenance purposes. It was fully inspected by the United States Coast Guard and the American Bureau of Shipping and found to be seaworthy.

Peter Paul	*States Steamship*
5. The District Court found that the notch, where the crack started, was a latent defect not discoverable by any known or ordinary test. The Court concluded, therefore, that the owner was entitled to rely on the opinjon of Lloyds and that the owner had used due diligence within the meaning of the Carriage of Goods by Sea Act in failing to discover the unseaworthiness of the vessel.	5. The District Court was unable to determine "just what latent defects in hull or equipment were responsible for the disaster" but it did conclude that "any defects in the vessel which caused her to sink were not apparent." The Court found that the owner did not use due diligence within the meaning of the Carriage of Goods by Sea Act but that the unseaworthiness was without the privity or knowledge of the owner within the meaning of the Limitation of Liability Act.
6. The Court of Appeals affirmed, and held that the owner was entitled to accept the Lloyds report at its face value, absent evidence of bias, incompetence or fraud. It stated: "While a master is presumed to know the general characteristics of his ship, he is not required to possess the combined knowledge and skill of a naval architect and metallurgist."	6. The Court of Appeals originally affirmed, holding the evidence ample that the owner could not have known of the crack sensitivity, especially in light of the Bureau of Standards test. The Court of Appeals then reversed itself, however, and held that knowledge must be imputed to the owner since it was not entitled to rely on the various inspections by the Coast Guard, the Bureau of Shipping and others.
All the shipowner need establish, said the court, "is that normal precautions were taken to see that a discoverable notch did not exist" before the vessel left port.	To the shipowner was thus imputed complete knowledge of the crack sensitivity of its vessel, knowledge beyond that normally available to the Coast Guard or the Bureau of Shipping. To it was imputed "the combined knowledge and skill of a naval architect and metallurgist."

The conflict is thus clear and irreconcilable. Whether the issue be one of due diligence under the Carriage of Goods by Sea Act or knowledge and privity under the Limitation of Liability Act, the *Peter Paul* decision holds that the owner can accept competent inspection reports at their face value, while the *States Steamship* opinion holds that the shipowner must be charged with personal knowledge of latent defects undiscovered by competent inspections of reliable agencies.

That such a conflict should create confusion in the maritime industry is both natural and understandable. But more than confusion has resulted. The decision below, imposing on the shipowner an imputed knowledge of crack sensitivity far beyond that possessed by the most careful inspector of the Coast Guard or Bureau of Shipping, has produced utter chaos. Nearly 5,000 cases of minor hull cracking have been reported aboard welded vessels constructed by war-time shipyards. All of the owners of these vessels must now be held to possess actual knowledge that at some unpredictable time and at some undiscoverable place on the vessel another crack will develop. The result is that these owners—and indeed their insurers—will be unable to undertake such impossible risks and will have to junk their vessels or dispose of them at great losses.*

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*As stated in the Seattle *Daily Shipping News*, Jan. 19, 1959, p. 1, following the denial of certiorari in this case: "This news has been greeted with anxiety by owners of welded ships, in that the decision reverses the long-standing law that a vessel owner is only liable for cargo up to the value of the ship involved in a sea disaster. . . . A *new* attack on the Limitation of an Owner's Liability in case of disaster has been successful. Every American owner of war-built tonnage is deeply affected thereby. . . . The

Before such an economic loss occurs and before such a departure from the accepted principles of admiralty law is permitted to stand, this Court should review the matter thoroughly. The conflicting *Peter Paul* decision, now pending before this Court, is reason enough for granting such a review. But of even greater importance is the fact that the court below, in reversing itself and in ignoring the realities of admiralty law, has created an unwarranted exception to the Limitation of Liability Act. If there is to be such an exception by judicial amendment, review by this Court becomes of critical importance.

Court [of Appeals] appeared to have virtually ignored the full compliance, in the case of SS 'PENNSYLVANIA' with requirements of the United States Coast Guard and American Bureau of Shipping. A shipowner thus, in this very technical metallurgical field, must make its own decisions on the many questions presented and, after a disaster, a Court will in each case have to determine whether the shipowner's judgment was right."

Conclusion

For the reasons set forth above and in the petition for a writ of certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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Counsel for Petitioner

February 3, 1959

Certificate of Counsel

We hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58(2) of the Rules of this Court.

ERSKINE WOOD
ERSKINE B. WOOD, JR.
STANLEY B. LONG
EUGENE GRESSMAN